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In The

# Supreme Court of the United States

INDEPENDENCE INSTITUTE,

*Petitioner,*

v.

BERNIE BUESCHER, SECRETARY OF STATE, STATE OF COLORADO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the First and Fourteenth Amendments forbid Colorado from imposing registration, administrative, and continuous reporting regulations on policy organizations that comment on state ballot measures but do not have the support or opposition of such measures as their central major purpose.

2. Whether Colorado's disclosure requirements for donors to ballot measure campaigns in which there is no chance of *quid pro quo* corruption violate the right to engage in anonymous speech and association.

## PARTIES TO THE PROCEEDING & CORPORATE DISCLOSURE STATEMENT

Petitioner is the Independence Institute, a Colorado non-profit corporation and plaintiff-appellant below. It has no parent corporation and no publicly held company owns stock in it.

Respondent is Bernie Buescher in his official capacity as Secretary of State, State of Colorado, defendant-appellee below.

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## OPINIONS BELOW

The decision of the Colorado Supreme Court denying certiorari was issued June 1, 2009, and is not reported in P.3d but is reprinted in the Appendix ("App.") at 96. The decision of the Colorado Court of Appeals was issued November 26, 2008, and appears at 209 P.3d 1130. App. 1. The Colorado District Court's order of May 3, 2007, granting Respondent's motion for summary judgment and denying Petitioner's motion for the same is reprinted at App. 33, but is not otherwise published. The Administrative Law Judge's decision finding that Petitioner is not an "issue committee" appears at App. 42 and is not otherwise published.

## JURISDICTION

Petitioner seeks review of the judgment and opinion issued by the Colorado Court of Appeals on November 26, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) after the Supreme Court of Colorado denied Petitioner's request for review by that court on June 1, 2009.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no

law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Fourteenth Amendment states that "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

The Colorado Constitution includes the following definition:

> "Issue committee" means any person, other than a natural person, or any group of two or more persons, including natural persons:
>
> (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or
>
> (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

COLO. CONST. art. XXVIII, § 2(10)(a); App. 105. Additional provisions of the Colorado Constitution regulate the contributions issue committees may accept and establish the reporting regulations to which they are subject. These provisions are reproduced in the Appendix. COLO. CONST. art. XXVIII; App. 99-126. Statutory provisions likewise impose contribution, expenditure and reporting conditions on issue committees. These provisions are reproduced in the Appendix. COLO. REV. STAT. §§ 1-45-108, 109, 111.5 (2008); App. 127-141. Finally, the Colorado Secretary of State has adopted regulations that affect the application of these constitutional and

statutory provisions. These provisions are reproduced in the Appendix. 8 COLO. CODE REGS. § 1505-6(1), (3)-(4) (2006); App. 142-162.

## STATEMENT OF THE CASE

The State of Colorado extends its campaign finance regulations far beyond what this Court's precedents have allowed. This approach has resulted in inconsistent protections for free speech and association, varying from jurisdiction to jurisdiction. Under Colorado law, any group of persons "supporting or opposing" a ballot issue must comply with registration, administrative and reporting requirements regardless of whether the group's primary or central purpose is campaign activity. The law thus imposes significant burdens on groups that wish to speak out about ballot issues. The law also denies contributors the right to engage in anonymous speech and association once they have contributed as little as $20 to the organization. Petitioner, the Independence Institute, a state-based policy organization, became ensnared in the laws when it spoke out against two tax and finance referenda in 2005.

### A. Factual Background

Petitioner Independence Institute (the "Institute") is a non-profit policy research organization located in Colorado. App. 164. It has served the same mission since its founding over two decades ago: "educate the

public about the benefits of the free market and the dangers of expansive government." App. 2. Its educational work includes commenting on proposed legislation, including initiatives. App. 167.

In the spring of 2005, the Colorado Legislature referred two taxing and financing issues – Referenda C and D – to the November ballot. App. 2. Both referenda affected, to varying degrees, Colorado's "Taxpayer Bill of Rights" (TABOR) and were designed to allow the state to keep and spend more money than it otherwise would have been able to under TABOR. App. 2. Believing the referenda would weaken TABOR, the Institute set out to educate the public about the State's budget shortfall, TABOR's benefits, and the referenda's impact on taxes and government spending. App. 168-169. The Institute published issue papers and op-eds about the referenda and collected information about the measures (both pro and con) and made it available on a website, www.taxincrease.org. App. 168-169. It also aired three radio advertisements concerning the measures. The advertisements did not urge a vote for or against the referenda, or for anyone to contact any elected officials, but instead urged listeners to go to the taxincrease.org website. App. 169.[1]

Campaigns for and against the referenda were intense. On August 4, 2005, Richard Evans, a

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[1] The texts of the advertisements are reproduced at App. 53-57.

member of the campaign organization "Vote Yes on C and D," filed a complaint against the Institute with the Colorado Secretary of State. App. 3. The complaint alleged that the Institute was an "issue committee" within the meaning of the Colorado Constitution and Colorado's Fair Campaign Practices Act and therefore needed to comply with those laws and the regulations promulgated pursuant to them. App. 3.

Under Article XXVIII of the Colorado Constitution, an "issue committee" is a corporation or group comprised of two or more persons "(I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or[2] (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." COLO. CONST. art. XXVIII, § 2(10)(a); App. 105. The definition's use of the indefinite article "a" to modify "major purpose" means that organizations can have multiple major purposes, any one of which can trigger issue committee status. That is, the definition is not confined to organizations with a central organizing purpose of supporting or opposing ballot measures, but includes groups that occasionally engage in ballot measure advocacy. The law does not contain any guidance on how much

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[2] Respondent has issued an administrative rule that interprets this provision in the conjunctive so that both sections (I) and (II) must be met before a group may be considered an "issue committee." *See* 8 COLO. CODE REGS. § 1505-6 (1.7(b)), reproduced at App. 144.

ballot measure advocacy might establish "a major purpose" and thereby trigger the law's registration and disclosure obligations.

The consequences of being designated an "issue committee" under Colorado law are substantial. Issue committees must register with the Secretary of State; set up a separate bank account for contributions related to ballot issues; track and report their contributions, including names and addresses of each person who has contributed $20 or more; track and report any expenditures made and any obligations entered into by the committee; and track and report the employer and occupation of anyone who contributes more than $100 to the committee. COLO. REV. STAT. § 1-45-108 & -109; App. 127-140. It must appoint a registered agent. COLO. REV. STAT. § 1-45-108(3)(b); App. 132. In its registration statement, the organization must also disclose the specific "purpose or nature of interest of the committee," and it may spend money only in connection with the ballot issues covered by that specific purpose, unless it amends its registration statement. COLO. REV. STAT. § 1-45-108(3); App. 132.[3]

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[3] As of the date of this Petition, Colorado law requires an issue committee to register with the State prior to accepting or making any contributions, so an organization that could be classified as an issue committee must predict in advance whether its activities include "a major purpose" of supporting or opposing a ballot measure. COLO. REV. STAT. § 1-45-108(3); App. 132. However, as of September 1, 2009, issue committees must instead register within ten days of accepting or making

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The burden of complying with these rules made the matter very significant for the Institute, and it hired lawyers to defend against the complaint. App. 170. The complaint resulted in an administrative hearing because, under Colorado law, the mere accusation that an organization is an "issue committee" automatically subjects that organization to an administrative hearing. *See* COLO. CONST. art. XXVIII, § 9(2)(a); App. 121-122. After considering "the relative value assigned to the credible evidence," the Administrative Law Judge concluded that the Institute was not an issue committee because of its long existence and variety of activities. App. 72. This evidence showed that the Institute did not have "a major purpose" of opposing Referenda C and D and the ALJ therefore dismissed the complaint. App. 82. Each party bore its own costs and fees. App. 82.

## B. Procedural Background

Before the Institute prevailed in the administrative hearings, it filed the present suit in Colorado state court against Respondent,[4] the state official charged with enforcing the issue committee provisions, challenging the constitutionality of Colorado's regulations. The Institute alleged, among other

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contributions or expenditures in excess of $200 to support or oppose any ballot measure. App. 182.

[4] Mr. Evans was originally a defendant to this suit, but was voluntarily dismissed.

things, that the definition of "issue committee" in the Colorado Constitution is vague and overbroad under the First and Fourteenth Amendments to the U.S. Constitution. App. 105-106. It also alleged that the disclosure requirements in COLO. REV. STAT. § 1-45-108 represented an unconstitutional infringement on the right to engage in anonymous speech and association. App. 127-134.[5]

The parties cross-moved for summary judgment. Before the motions were resolved, the Secretary issued "emergency" rules creating a new breed of regulated entity, "multi-purpose issue committees," addressing organizations whose activities placed them between an unregulated organization and a fully regulated "issue committee." 8 COLO. CODE REGS. § 1505-6(4.15) (2007); App. 157-158. The new rules modified, but did not remove, regulations on organizations whose sole major purpose was not the support or opposition of ballot measures. Under the Secretary's rules, "multi-purpose issue committees" must (i) report only those contributions made to support or oppose a ballot issue, (ii) segregate into separate accounts those contributions accepted to

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[5] Prior to the resolution of the administrative hearing, Respondent moved to dismiss the Institute's claims on the basis of the doctrine of primary jurisdiction. App. 40. After the Administrative Law Judge dismissed the administrative complaint, the district court issued an order that denied the motion, but provided that "[the court's] determination in this action shall be limited to . . . facial challenges and shall not extend to any as-applied challenges." App. 40.

support or oppose a ballot issue, and (iii) for any general donations that are used for support of or opposition to a ballot issue, place them in a separate account and report them as contributions from the committee to itself. App. 157-158.

The district court denied the Institute's motion for summary judgment and granted Respondent's motion. App. 33-39. The Institute appealed and the Colorado Court of Appeals upheld the district court's conclusions on the substantive constitutional issues. App. 1-32. In particular, the court of appeals found that the use of the term "a major purpose" in the definition of "issue committee" did not render the provision unconstitutionally vague or overbroad. App. 12-20. In doing so, the court explicitly disagreed with the decision of the Fourth Circuit in *North Carolina Right to Life v. Leake,* 525 F.3d 274, 289 (4th Cir. 2008) ("*NCRTL*"). App. 13-20. In that case, the Fourth Circuit addressed a law that defined "political committee" using the term "a major purpose." The Fourth Circuit concluded that this phrase was impermissibly vague and overbroad. *NCRTL,* 525 F.3d at 289-90. The Colorado court instead adopted the reasoning in the dissenting opinion of Judge Michael in *NCRTL*. *See NCRTL,* 525 F.3d at 328-29 (Michael, J., dissenting); App. 15-17. In particular, the Colorado court concluded that the law was not vague because, in identifying "a major purpose" or "the major purpose" of an organization, the government would consider the same evidence in determining whether ballot measure advocacy

constitutes a considerable or principal portion of the organization's total activities. App. 17. The court noted that to determine whether an organization has "a major purpose" of engaging in ballot measure advocacy, the organization "could look to and compare" the purposes stated in its charter, articles of incorporation, and by-laws; the purposes of its activities and annual expenditures; and the scope of issues addressed in its print and electronic publications. App. 17. The court also concluded that the phrase "a major purpose" was not unconstitutionally overbroad because Respondent's "multi-purpose issue committee" rules, combined with the court's fact-specific inquiry of its vagueness analysis, "provide sufficient guidance as to when a multi-purpose group has 'a major purpose' of supporting or opposing a ballot measure." App. 19-20.

The Colorado court also rejected the Institute's anonymous speech claims. App. 23-28. The court concluded that the Institute had not presented any evidence that the compelled disclosure of its contributors would subject such contributors to threats, harassment, or reprisals from other government officials or private parties. App. 27.

The Institute sought review at the Colorado Supreme Court, which, in a divided order, declined to review the appellate court's decision. App. 96-97. Chief Justice Mullarkey and Justice Eid dissented and would have granted review on the questions of whether the definition of "issue committee" in Article XXVIII was vague or overbroad and whether the

disclosure requirements violated the right to engage in anonymous speech and association. App. 96-97.

## REASONS FOR GRANTING THE WRIT

The decision of the Colorado Court of Appeals that the definition of "issue committee" in Article XXVIII of the Colorado Constitution was not vague or overbroad conflicts with this Court's decision in *Buckley v. Valeo,* 424 U.S. 1, 79 (1976), which held that political committee regulation may only reach organizations whose central organizing purpose is "the nomination or election of a candidate." The decision below also conflicts with, among others, the decision of the United States Court of Appeals for the Fourth Circuit in *NCRTL*, which held that this Court meant what it said in *Buckley* when it concluded that political committee regulation may only extend to organizations "the major purpose" of which is campaign related. Certiorari is therefore appropriate under Supreme Court Rule 12(b) & (c).

This Court should also grant the Writ because the decision below concluded that Colorado's registration and disclosure laws, which apply to issue committee donors, do not violate the right to engage in anonymous speech and association, an important question of federal law that has not been, but should be, settled by this Court. Alternatively, the decision below conflicts with this Court's decision in *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 347 (1995),

which recognized that anonymous speech and association are fundamental rights and, outside of the candidate context, any regulations affecting them must be narrowly tailored to promote a compelling government interest. Put another way, there is an inherent tension between this Court's decision in *McIntyre* and other cases protecting anonymous speech and dicta from other decisions from this Court discussing the informational value of such disclosure laws in the ballot measure context. This tension has led lower courts, including the court below, to grant such dicta primacy over the holdings of *McIntyre* and other cases. As on-line information regarding citizens' political contributions to controversial ballot measures increasingly enables harassment and retribution by ideological opponents, it is now time for this issue to be definitively settled by this Court and Certiorari is therefore appropriate on this issue under Supreme Court Rule 12(c).

## I. REVIEW IS REQUIRED BECAUSE THE LOWER COURT DID NOT FOLLOW THIS COURT'S DECISION IN *BUCKLEY* REGARDING THE DEFINITION OF POLITICAL OR ISSUE COMMITTEE, CAUSING A SPLIT BETWEEN IT AND THE FOURTH CIRCUIT AND CREATING INCONSISTENT PROTECTIONS FOR FREE SPEECH ACROSS THE COUNTRY.

### A. *BUCKLEY* ESTABLISHED A CLEAR STANDARD FOR WHEN AN ORGANIZATION MAY BE REGULATED AS A POLITICAL OR ISSUE COMMITTEE.

In *Buckley,* this Court considered the reporting requirements for "political committees" and others in Sections 434(a) and (e) of the Federal Election Campaign Act of 1971 (FECA). In so doing, this Court interpreted the term "political committee" to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79. The Court adopted this interpretation from two lower court decisions construing the term "political committee" not to apply to organizations that do not campaign for candidates. *Id.* at 79 n.106 (citing *U.S. v. Nat'l Comm. for Impeachment,* 469 F.2d 1135, 1139-42 (2d Cir. 1972) and *Am. Civil Liberties Union v. Jennings*, 366 F. Supp. 1041, 1055-57 (D.D.C. 1973) (three-judge panel), *vacated as moot, Staats v. Am. Civil Liberties Union*, 422 U.S. 1030 (1975)). In each of those cases, the lower courts

narrowly defined "political committee" to apply only to those groups "organized or at least authorized by a particular candidate and whose principal focus is a specific campaign" in order to comply with Congress's primary concern in passing the law and to avoid "serious constitutional issues" that could result in a "dampening effect on first amendment rights and the potential for arbitrary administrative action." *Nat'l Comm. for Impeachment*, 469 F.2d at 1140-42; *see also Jennings*, 366 F. Supp. at 1057 (concluding that the judges were "in full agreement" with the decision in *National Committee for Impeachment*). As the Second Circuit explained, this interpretation was necessary to ensure that "every position on any issue . . . and any comment upon it in, say, a newspaper editorial or an advertisement would [not] be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with." *Nat'l Comm. for Impeachment*, 469 F.2d at 1142.[6]

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[6] The Institute does not argue that the political speech of organizations having "the major purpose" of nominating or electing candidates can be regulated in all instances or that the burden of such regulation cannot be accounted for in considering the constitutionality of government restrictions on political or issue committees. Rather, the Institute's position is that the question of whether, or to what extent, an organization may be regulated as a political or issue committee should not even arise unless that organization has as its central purpose election-related activities. In other words, having "the major purpose" is a condition precedent for political or issue committee status in the first place and an organization that does not have as its

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This Court has continued to use the *Buckley-Jennings-National Committee for Impeachment* interpretation of "political committee." *See Fed. Election Comm'n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986) ("*MCFL*") ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee.");[7] *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 170 n.64 (2003) (citing *Buckley*). Similarly, the Federal Election Commission has recognized that this Court adopted the major purpose test because the test allowed the Court to avoid issues of vagueness and overbreadth. *See* Political Committee Status, Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007) (In *Buckley*, "the Supreme Court mandated that an additional hurdle was necessary to avoid Constitutional vagueness concerns; only organizations whose 'major purpose' is the nomination or election of a Federal candidate can be considered 'political committees' under the Act. The court deemed this necessary to avoid the

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central organizing principle campaign-related activities cannot be regulated as a political or issue committee at all.

[7] In *MCFL*, this Court noted that MCFL was not a "political committee" under *Buckley* because its "central organizational purpose is issue advocacy, although it occasionally engages in activities on behalf of political candidates." *MCFL*, 479 U.S. at 253 n.6. This Court also noted that, under the law at issue in that case, "all MCFL independent expenditure activity is . . . regulated as though the organization's major purpose is to further the election of candidates." *Id.* at 253.

regulation of activity 'encompassing both issue discussion and advocacy of a political result.'") (quoting *Buckley*, 424 U.S. at 79); *see also Shays v. Fed. Election Comm'n*, 511 F. Supp. 2d 19, 26 (D.D.C. 2007) (noting that, "In *Buckley*, the Court addressed constitutional concerns that the statutory definition of 'political committee' was overbroad and, to the extent it incorporated the definition of 'expenditure,' vague as well.").

### B. *BUCKLEY'S* STANDARD IS THE LAW IN THE SECOND AND FOURTH CIRCUITS AND HAS BEEN APPLIED BY FEDERAL DISTRICT COURTS ACROSS THE COUNTRY.

It should come as no surprise then that when the Fourth Circuit addressed a state statute that diluted this requirement for political committees, the court struck it down as vague and overly broad. In *NCRTL*, the court examined a state statute that, like Colorado's Article XXVIII, extended "political committee" status to any two or more individuals who have "a major purpose to support or oppose the nomination or election of one or more clearly identified candidates." *NCRTL*, 525 F.3d at 286. Like the Institute, the plaintiffs in *NCRTL* argued that the use of the definite article was crucial to the constitutionality of the statute and that extending political committee regulation to a group that had more than one major purpose of supporting or

opposing the nomination of a clearly defined candidate violated this Court's decision in *Buckley*. As the Second Circuit did in *National Committee for Impeachment*, the Fourth Circuit concluded that the term "political committee" must be defined in a narrow way if the government is to avoid vagueness and overbreadth problems.

The Fourth Circuit noted that:

> If organizations were regulable merely for having the support or opposition of a candidate as "*a* major purpose," political committee burdens could fall on organizations primarily engaged in speech on political issues unrelated to a particular candidate. This would not only contravene both the spirit and the letter of *Buckley's* "unambiguously campaign related" test, but it would also subject a large quantity of ordinary political speech to regulation.

*Id.* at 287-288 (emphasis in original). The court held that "we are convinced that the Court in *Buckley* did indeed mean exactly what it said when it held that an entity must have '*the* major purpose' of supporting or opposing a candidate to be designated a political committee." *Id.* at 288 (emphasis in original). The court then concluded that, unless *Buckley's* holding is strictly adhered to, it would be impossible for organizations to know when one of their purposes was sufficiently "major" to bring them within the reach of the statute and that such an amorphous law would leave such groups subject to partisan or

ideological abuse. *Id.* at 290.[8] This reasoning applies with even greater force to Colorado's law, because groups supporting or opposing ballot measure issues are, by definition, engaged in issue advocacy.

Other decisions have likewise held that only those groups with a central organizing purpose of campaigning can be required to become political committees. *See Real Truth About Obama, Inc. v. Fed. Election Comm'n*, No. 08-1977, 2009 WL 2408735 at *6 (4th Cir. Aug. 5, 2009) ("The major purpose test is intended to exempt from regulation organizations that expend or contribute money for express advocacy but do not have as the major purpose of their existence the election or defeat of a particular candidate."); *Ctr. for Individual Freedom, Inc. v. Ireland,* 613 F. Supp. 2d 777, 795 (S.D.W.V. 2009) (applying *NCRTL* and holding that a statute that applied political committee status to organization "the purpose" of which was campaign-related meant the law was more narrow than the law at issue in *NCRTL*); *Broward Coalition of Condominiums, Homeowners Ass'ns & Cty. Orgs. Inc. v. Browning,* 2008 U.S. Dist. LEXIS 91591, at *41 (N.D. Fla. Oct. 29, 2008) (applying

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[8] The exposure to such partisan or ideological abuse is compounded in Colorado because of the law's requirement that a complaint automatically result in an administrative hearing. *See* COLO. CONST. amend. XXVIII, § 9(2)(a); App. 121-122. Thus, the mere accusation that an organization is an "issue committee" subjects that organization to a burdensome administrative hearing, and depending on the result of that hearing, significant administrative, disclosure, and reporting requirements.

*NCRTL* and holding that "The Supreme Court has made absolutely clear that the burdensome structural and reporting requirements that apply to PACs may *only* be visited on groups 'the major purpose of which is the nomination or election of a candidate.'") (quoting *Buckley,* 424 U.S. at 79)); *Nat'l Right to Work Legal Defense & Educ. Found., Inc.,* 581 F. Supp. 2d 1132, 1153 (D. Utah 2008) (applying *NCRTL* and concluding that, "Utah does not even attempt to comply with *Buckley's* 'major purpose' requirement, and has pushed the reach of political committee regulation beyond constitutional limits.").

### C. THE DECISION BELOW CONFLICTS WITH THE FOURTH CIRCUIT'S DECISION IN *NCRTL* AND ESTABLISHES AMBIGUOUS, OVERLY BROAD STANDARDS THAT CAN HAVE GRAVE CONSEQUENCES FOR FREE SPEECH ACROSS THE COUNTRY.

Nonetheless, despite this Court's and the lower federal courts' clear guidance that only organizations whose principal focus is unambiguously campaign focused may be constitutionally regulated as political committees, the State of Colorado extends its campaign finance regulations to organizations with only "a major purpose of supporting or opposing any ballot issue or ballot question." COLO. CONST. art. XXVIII, § 2(10)(a). The Colorado Court of Appeals found that this formulation was not vague or overbroad. App. 10-20. In so doing, the court adopted the dissenting view

of Judge Michael in *NCRTL*, who concluded that there was nothing in *Buckley* that said that the definite article was required. *NCRTL*, 525 F.3d at 309 (Michael, J., dissenting); App. 15.

The court did not, presumably because it could not, state what weight multi-purpose organizations such as the Institute (or its ideological or political opponents when they seek to have the Institute declared an "issue committee") are to give to each factor, nor did the court explain how to determine when an organization has too many factors weighing against it, or how long these factors must be in place, before an organization is transformed into an issue committee.[9] But the court of appeals' test, like Judge Michael's test in *NCRTL*, ignores the fact that speakers, such as the Institute, must be able to determine in advance not whether they, themselves,

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[9] The court also concluded that the last-minute rules issued by Respondent limited the disclosure and termination requirements for "multi-purpose issue committees" and overcame any problems with overbreadth in the law. App. 19. However, these standards merely altered the consequences of regulation; they did not change the fact that the law expands far beyond the organizations this Court said could be regulated as political committees in *Buckley*. In other words, Respondent's regulations merely attempt to mitigate the severity of the constitutional violation; they do not cure it. Indeed, Respondent's last-minute regulations actually demonstrate how amorphous and prone to abuse the Colorado law's standards are. The fact that Respondent felt compelled to adopt regulations radically altering the extent and consequences of the law itself suggests that the law sets no concrete, easily comprehensible standards.

think they have a major purpose, but whether, as a matter of law, they do. The legal consequences of having "a major purpose" may be determined by the government or potential complainants regardless of what the Institute itself concludes about its activities. None of the court of appeals' test, Judge Michael's dissent, or the approach taken by the ALJ provide any objective or predictable means of deciding whether a group is an issue committee before an enforcement action may be brought against it. In other words, the question of whether one of a group's purposes is "major" is a matter of opinion, while the question of whether a group's primary organizing principle is campaigning is not.

Even with the clear impact on free speech and free association inherent in such an amorphous standard, the decision below is not the only case rejecting *NCRTL*. The Colorado court's approach is similar to the conclusion adopted by another federal district court. *See Human Life of Wash. v. Brumsickle*, 2009 U.S. Dist. LEXIS 4289 (W.D. Wash. Jan. 8, 2009) (adopting Judge Michael's dissent in *NCRTL* and concluding that any vagueness problems can be addressed because "parties can request prior interpretations from" the regulatory agency). That case is currently on appeal before the Ninth Circuit.

The decision below thus conflicts with the narrowing interpretation adopted by this Court and employed by the Fourth Circuit. Unless this split is resolved, the residents of some states, like Colorado and Washington, will be subject to vague, overbroad

regulations on their ideological and issue-oriented activities in a way that residents of other states, such as North Carolina and Florida, are not. But the First Amendment mandates that the entire country be able to engage in free speech and free association without having to guess as to when one of their "major purposes" pushes them too far towards regulation. This Court's review is therefore necessary to (i) reaffirm that only organizations that have election-related activities as their central organizing purpose are subject to regulation as political or issue committees, and (ii) to provide clear standards to protect free speech and association for issue-oriented organizations across the entire nation.

## II. REVIEW IS NECESSARY TO RESOLVE WHETHER THE GOVERNMENT MAY REQUIRE DISCLOSURE OF CONTRIBUTORS TO BALLOT MEASURE CAMPAIGNS THAT HAVE NO POSSIBILITY OF *QUID PRO QUO* CORRUPTION.

### A. THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL LAW REGARDING THE APPLICATION OF DISCLOSURE RULES IN THE BALLOT MEASURE CONTEXT.

This case implicates two disparate themes in this Court's free speech jurisprudence.

First, in *McIntyre v. Ohio Elections Commission,* this Court struck down a law that required the

disclosure of one's identity on written election communications. 514 U.S. 334, 357 (1995). This Court held that individuals have a right to anonymous speech and that a law requiring them to disclose their views on controversial issues violated that right. *Id.* "[A]n author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 342. This Court also emphasized the importance of anonymity in protecting the rights to speech and association. "Anonymity is a shield from the tyranny of the majority" that "exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation – and their ideas from suppression – at the hand of an intolerant society." *Id.*; *see also Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 92 (1982); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Britt v. Superior Court of San Diego,* 574 P.2d 766, 771 (Cal. 1978) (noting that "numerous cases establish that compelled disclosure of an individual's private associational affiliations and activities . . . poses one of the most serious threats to the free exercise of this constitutionally endowed right.").

Second, this Court has nonetheless upheld various mandatory disclosure requirements for contributions in political candidate elections. *See, e.g.*, *McConnell*, 540 U.S. at 196-99; *Buckley*, 424 U.S. at 68 (assuming that "disclosure requirements certainly

in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption Congress found to exist"). This Court has not, however, specifically addressed whether the mandatory disclosure of political contributions in the ballot measure context is constitutionally permissible. This Court has suggested in dicta, though, that disclosure in such circumstances may be valuable "so that the people will be able to evaluate the arguments to which they are being subjected." *First Nat'l Bank v. Bellotti,* 435 U.S. 765, 792 n.32 (1978); *accord Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999); *Citizens Against Rent Control v. City of Berkley*, 454 U.S. 290, 299-300 (1991). This was despite this Court's recognition that ballot measure elections do not present the same opportunity for *quid pro quo* corruption present in candidate elections and that the government has less interest in regulating speech in such circumstances. *See, e.g., Bellotti*, 435 U.S. at 790 ("The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue.").

The court below found the dicta from *Bellotti*, *American Constitutional Law Foundation,* and *Citizens Against Rent Control*, to be more persuasive than the reasoning of *McIntyre*. App. 26-27.[10] The Colorado

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[10] The court was also persuaded by the Ninth Circuit's decision in *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1101 (9th Cir. 2003), which held that express ballot

(Continued on following page)

court held that, because the Institute had not demonstrated that compelled disclosure of its contributors would subject them to threats, harassment or reprisals from government officials or private parties, the Colorado statute was constitutional. App. 27. The court never examined whether the government had met its burden of demonstrating either a compelling government interest in disclosure or whether the Colorado statute was narrowly tailored to achieve that interest. *See Fed. Election Comm'n v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) ("[T]he *Government* must prove that applying [the law] furthers a compelling governmental interest and is narrowly tailored to achieve that interest.") (emphasis in original).

The inherent tension between this Court's decision in *McIntyre*, on one hand, and the holdings of *McConnell* and *Buckley* and the dicta discussed above, on the other, has led courts, such as the court below, to give primacy to disclosure over the fundamental right to engage in anonymous speech and association in the ballot measure context. The

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measure advocacy may be regulated, provided that the state has a compelling interest and that the regulations are narrowly tailored to advance the relevant interest. App. 27. The Ninth Circuit, after remanding *Getman*, ultimately concluded that disclosure of contributions to organizations promoting ballot measures was supported by a compelling government interest and that California's regulations were narrowly tailored to achieve that interest. *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178-87 (9th Cir. 2007).

Institute believes that this tension fundamentally undermines the rights recognized in *McIntyre* and this Court should resolve this disparity by recognizing, as it has in the past, that ballot measure elections do not present the same concerns about *quid pro quo* corruption that candidate elections do and that the government's interest in disclosure recognized in *Buckley* applies only to candidate elections. *See Brown*, 459 U.S. at 92 (stating that the Court in *Buckley* found three interests sufficient to justify mandatory disclosure: "enhancement of voters' knowledge about a candidate's possible allegiances and interests, deterrence of corruption, and the enforcement of contribution limitations.")[11]

### B. THE CONSTITUTIONALITY OF LAWS MANDATING DISCLOSURE IN THE BALLOT MEASURE CONTEXT IS A RECURRING ISSUE OF SIGNIFICANT IMPORTANCE ACROSS THE COUNTRY.

Two recent trends have highlighted the importance of this Court's resolving the tension in its precedents in favor of affirming the fundamental First Amendment right to anonymous speech and association in the ballot measure context. First,

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[11] This Court recently affirmed that preventing corruption or the appearance of corruption is the only legitimate and compelling government interest thus far identified for restricting campaign finances. *Davis v. Fed. Election Comm'n*, __ U.S. ___, 128 S. Ct. 2759, 2773 (2008).

technological developments have lowered the cost of identifying one's political opponents and publicizing their identities. Second, ballot measures often involve the most controversial issues of the day, including same-sex marriage, government assistance for undocumented immigrants, assisted suicide, and embryonic stem cell research. In combination, these two trends have produced conscious efforts to chill speech.

Advocates have begun using the disclosure information posted on government websites to launch campaigns of harassment and retribution against contributors to the opposing side in controversial ballot campaigns. *See Protect Marriage Washington v. Reed*, No. 09-5456BHS (W.D. Wash. July 29, 2009) (granting temporary restraining order against disclosure of individuals' identities who oppose gay marriage); *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199-1205 (E.D. Cal. 2009) (documenting the retaliation faced by supporters of California's recent Proposition 8, including death threats, harassing emails and phone calls, broken windows, and economic retaliation); John R. Lott, Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides: Supporters of California's Prop. 8 Have Faced a Backlash*, WALL ST. J., Dec. 26, 2008; Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, ROCKY MOUNTAIN NEWS, Nov. 30, 2008 (business picketed and boycotted based on CEO's personal donation); Associated Press, *John Kerry Grills Belgium Ambassador Nominee Over Swift Boat Donation*, Feb. 28, 2007 ("A Senate hearing that began with glowing tributes to a St.

Louis businessman and his qualifications to become ambassador to Belgium turned bitterly divisive Tuesday after he was criticized for supporting a controversial conservative group.").

The potential for such harassment increases in the ballot measure context because, unlike a contribution to a candidate, a contribution to a ballot measure committee directly discloses the contributors' views on what may be an extremely contentious issue, raising the chances that ideological opponents will use that information to select specific targets for harassment. *See Brown*, 459 U.S. at 96 n.14 ("The preservation of unorthodox political affiliations in public records substantially increases the potential for harassment above and beyond the risk that an individual faces simply as a result of having worked for an unpopular party at one time."). This trend certainly suggests that this Court's conclusion in *Buckley* that disclosure imposes a minimal infringement on the right of association simply does not apply in the ballot measure context, especially in light of recent technological changes.

The easy accessibility of information about one's political leanings, address, employer, and occupation, and the increasing abuse of that information, makes review by this Court all the more pressing. The lower courts have been applying contradictory standards and generally failing to give the right to engage in anonymous speech and association its proper respect. At the very least this Court should grant the petition here, vacate the decision of the Colorado Court of Appeals, and remand this case to the trial court with

instructions to consider whether Respondent can demonstrate a compelling government interest in the disclosure of contributors to ballot measure campaigns and whether, or to what extent, Colorado's law is narrowly tailored. *See Canyon Ferry Rd. Baptist Church v. Unsworth*, 556 F.3d 1021, 1034 (9th Cir. 2009) (striking down the application of Montana's disclosure laws for "incidental committees" in the ballot measure context where organization's election-related activities were *de minimis*).

## CONCLUSION

For the reasons stated, Petitioner Independence Institute respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

INSTITUTE FOR JUSTICE
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August 31, 2009.

COLORADO COURT OF APPEALS

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Court of Appeals No.: 07CA1151
City and County of Denver District
Court No. 05CV7604
Honorable Herbert L. Stern, III, Judge

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Independence Institute, a Colorado non-profit corporation,

Plainitff-Appellant,

v.

Mike Coffman, in his official capacity as Secretary of State of the State of Colorado,

Appellee.

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JUDGMENT AFFIRMED

Division II
Opinion by: JUDGE TAUBMAN
Carparelli, J., concurs
Connelly, J., specially concurs

Announced: November 26, 2008

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Jackson Kelly PLLC, Shayne M. Madsen, Denver, Colorado; William H. Mellor, III, Steven M. Simpson, Arlington, Virginia, for Plaintiff-Appellant.

John W. Suthers, Attorney General, Maurice G. Knaizer, Deputy Attorney General, Monica M.

Marquez, Assistant Solicitor General, Denver, Colorado, for Appellee.

In this campaign finance law dispute, plaintiff, the Independence Institute, appeals the summary judgment entered by the trial court in favor of Mike Coffman, in his official capacity as Secretary of State of Colorado. Because we conclude the definition of "a major purpose" in article XXVIII, section 2(10), of the Colorado Constitution is not unconstitutionally vague or overbroad on its face, we affirm the trial court's judgment.

## I. Background

Founded in 1985, the Independence Institute is a nonprofit policy research organization located in Golden, Colorado. Its purpose is "to educate the public about the benefits of the free market and the dangers of expansive government." To do so, the Independence Institute provides policy makers, legislators, business leaders, the media, and Colorado citizens with educational materials about policy issues with which it is concerned.

In the spring of 2005, the General Assembly referred two tax and financing issues – Referenda C and D – to the November ballot. Referendum C would allow the state to retain revenues over a five-year period that would otherwise have to be refunded to taxpayers under the Taxpayer Bill of Rights (TABOR), Colo. Const. art. X, § 20. Referendum D was intended to work in conjunction with

Referendum C, allowing the state to issue bonds for certain projects and to trigger provisions in Referendum C to allow the state to spend an additional $100 million each year if Referendum D passed.

Amid wide-ranging campaigns supporting and opposing the adoption of Referenda C and D, the Independence Institute, through its fiscal policy center, initiated an education campaign to inform the public about the impact of Referenda C and D on taxes and government spending. As part of its education campaign, the Independence Institute aired three radio commercials, which provided information on the tax implications of Referendum C, directed listeners to a website to learn more information, but did not explicitly ask listeners to vote yes or no on the referendum. Subsequently, the voters approved Referendum C but not Referendum D.

This dispute began in August 2005 when Richard Evans, an agent of "Vote Yes on C and D," an issue committee promoting the adoption of statewide referenda during the 2005 election, filed an administrative complaint with the Secretary of State. Evans alleged that the Independence Institute was an issue committee opposed to those referenda and had failed to comply with registration, reporting, and disclosure requirements of article XXVIII and the Fair Campaign Practices Act (FCPA), sections 1-45-101 to -115, C.R.S. 2008. As required by section 9(2)(a) of article XXVIII, the Secretary referred Evans's complaint to the Office of Administrative Courts for an administrative hearing.

While the administrative proceedings were pending, the Independence Institute filed this lawsuit against Coffman's predecessor, alleging constitutional challenges to article XXVIII and the disclosure provisions of the FCPA. The trial court denied the Independence Institute's request for preliminary injunction to enjoin the administrative hearing scheduled for October 12, 2005. Accordingly, the administrative hearing went forward, and a few days after the election, the administrative law judge (ALJ) issued a decision concluding that the Independence Institute was not an "issue committee" with respect to its activities concerning Referenda C and D and therefore had not violated the registration and disclosure provisions in article XXVIII or the FCPA.

Notwithstanding its favorable decision from the ALJ, the Independence Institute pursued this litigation, maintaining that the constitutional and statutory provisions at issue were unconstitutional on their face. In May 2007, the district court granted summary judgment in favor of Coffman on all of the Independence Institute's claims.

ii. Issue Committee Provisions

Article XXVIII establishes Colorado's campaign and political finance laws as constitutional provisions. The purpose of the article is to require certain disclosures of contributions made to influence election outcomes not only as to political candidates, but as to ballot issues as well. *See* Colo. Const. art. XXVIII, § 1.

The requirements ensure that large contributions made to influence election outcomes are not concealed, and that special interest groups cannot disproportionately influence elections outcomes. *Id; see also Colorado Citizens for Ethics in Gov't v. Comm. for Am. Dream,* 187 P.3d 1207, 1215-16 (Colo. App. 2008) (*CCEG*).

> Article XXVIII defines an issue committee as:
>
> any person, other than a natural person, or any group of two or more persons, including natural persons:
>
> (I) [t]hat has *a major purpose* of supporting or opposing any ballot issue or ballot question; *or*
>
> (II) [t]hat has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

Colo. Const. art. XXVIII, § 2(10)(a) (emphasis added). By regulation, Coffman has interpreted the emphasized word "or" to mean "and." *See* Sec'y of State Campaign & Political Finance Rules 1.7, 8 Code Colo. Regs. 1505-6. When an organization is deemed an issue committee, it must fully comply with reporting requirements set forth in article XXVIII and the FCPA.

Among the requirements, all issue committees must register with the Secretary of State before accepting or making any contributions and disclose the name and address of each person who contributed

$20 or more, including the occupation and employer of each person who has made a contribution of $100 or more. § 1-45-108(1)(a)(I)-(II), C.R.S. 2008.

All issue committees must regularly report to the Secretary of State the balance of funds at the beginning of the reporting period, the amounts of contributions received, and expenditures made during the reporting period. § 1-45-108(2)(b), C.R.S. 2008. Additionally, "[a]n issue committee shall be considered open and active until [it] affirmatively" terminates its designation as an issue committee with the state. Colo. Const. art. XXVIII, § 2(10)(c).

The provisions at issue here concern "multi-purpose issue committees." Although that term is not defined in article XXVIII, it was defined in a regulation adopted by the Secretary of State after the ALJ issued her administrative ruling but before the district court ruled on the parties' cross-motions for summary judgment. The regulation defines a multi-purpose issue committee as "an issue committee whose purposes are not limited to supporting or opposing ballot issues or ballot questions." *See* Secretary of State Campaign & Political Finance Rules 3.8, 8 Code Colo. Regs. 1505-6. The parties here agree that the Independence Institute is not a single-purpose issue committee.

The questions before us now relate only to the propriety of the trial court's summary judgment. Neither the trial court's denial of the Independence Institute's motion for preliminary injunction nor the

ALJ's decision in favor of the Independence Institute is before us here.

## III. Standard of Review

We review a trial court's grant of summary judgment de novo. *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1526 (Colo. 1995). Summary judgment is appropriate only if the pleadings and supporting documents demonstrate there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Id.*; *see* C.R.C.P. 56(c).

Interpretation of a constitutional provision is a question of law that we review de novo. *Rocky Mountain Animal Defense v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004) (*RMAD*). In addition, since the judgment relates to political speech, we review the entire record "to ensure that the judgment rendered does not intrude on the right of free speech." *See Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001).

## IV. Vagueness and Overbreadth

The Independence Institute argues that Colorado Constitution article XXVIII, § 2(10)(a), which defines "issue committee," is unconstitutionally vague and overbroad on its face. We disagree.

In construing a constitutional amendment, we must ascertain and give effect to the intent of the

electorate adopting the amendment. *Zaner v. City of Brighton,* 917 P.2d 280, 283 (Colo. 1996); *CCEG,* 187 P.3d at 1215 (citing *RMAD,* 100 P.3d at 513-14). To determine that intent, we first look at the plain and ordinary meaning of the words in the amendment without engaging in narrow or overly technical constructions. *RMAD,* 100 P.3d at 514. We may also discern the electorate's intent by considering the ballot title, the submission clause, the Bluebook, and other materials. *Id.* Moreover, if the language is ambiguous or reasonably susceptible of more than one interpretation, then we consider the objective to be accomplished and the "mischief to be avoided." *Zaner,* 917 P.2d at 283. Finally, we must consider the amendment as a whole, and if possible, interpret the provision in harmony with other provisions to avoid a conflict. *Id.*

General rules of statutory construction apply when interpreting citizen-initiated measures. *RMAD,* 100 P.3d at 514; *see also Bickel v. City of Boulder,* 885 P.2d 215, 228 n.10 (Colo. 1994) (courts may interpret citizen-initiated measures using the general rules of statutory construction); *Nevada Tax Comm'n v. Bernhard,* 683 P.2d 21, 23 (Nev. 1984) (laws approved by referendum are interpreted using general rules of statutory construction).

State constitutional provisions that violate federal constitutional law can be held invalid facially or as applied. *Alliance for Colorado's Families v. Gilbert,* 172 P.3d 964, 968 (Colo. App. 2007). As-applied constitutional challenges attempt to

invalidate a law only in the circumstances in which a party has acted or proposes to act; thus, a law that is held invalid as applied is not rendered completely inoperative. *Sanger v. Dennis,* 148 P.3d 404, 410 (Colo. App. 2006). In contrast, a party who brings a facial challenge must establish that the law is invalid in all respects and cannot be constitutionally applied in any circumstance. *Id.* at 411. A party challenging a constitutional amendment must show it to be unconstitutional beyond a reasonable doubt. *Evans v. Romer,* 854 P.2d 1270, 1274 & n.6 (Colo. 1993) (presumption of constitutionality of amendment to Colorado Constitution is more forceful than similar presumption with respect to statutes, in recognition of "the broad powers which our state constitution places in the people"); *People ex rel. Tate v. Prevost,* 55 Colo. 199, 134 P. 129 (1913).

We are also mindful that facial challenges are disfavored. *Wash. State Grange v. Wash. Republican Party,* ___ U.S. ___, 128 S.Ct. 1184, 1191, 170 L.Ed.2d 151 (2008). Facial challenges are disfavored because (1) courts may be forced to rely on speculation, (2) there is a risk of premature statutory interpretation, (3) courts may have to anticipate questions of constitutional law when unnecessary, (4) courts may have to formulate constitutional rules broader than those required by the precise facts to which they would be applied, and (5) they may prevent the implementation of laws that embody the will of the people. *Id.*

As discussed below, we conclude that article XXVIII, § 2(10)(a) is neither facially vague nor overbroad.

A. Vagueness

Initially, the Independence Institute asserts that the trial court erred in using an improper standard of vagueness, rather than the stricter standard that applies in First Amendment cases. Coffman does not dispute that the trial court erred in this regard, but simply contends that the Independence Institute has not articulated how the stricter test dictates a different result here. Accordingly, we apply the stricter vagueness test applicable to First Amendment cases.

A law that is unduly vague violates the Due Process Clause of the Fourteenth Amendment. *Parrish v. Lamm,* 758 P.2d 1356, 1367 (Colo. 1988) (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 497 (1982)). The vagueness doctrine helps to ensure that a law is sufficiently definite so that citizens will be alerted to the conduct that is proscribed and they may act accordingly, and so that the law will not be arbitrarily applied. *Regency Services Corp. v. Bd. of County Comm'rs,* 819 P.2d 1049, 1055 (Colo. 1991).

A law is vague where persons of ordinary intelligence must necessarily guess as to its meaning and differ as to its application. *People v. Gomez,* 843 P.2d 1321, 1322 (Colo. 1993); *People v. Becker,* 759

P.2d 26, 31 (Colo. 1988). However, laws concerning First Amendment protected activities are analyzed under stricter vagueness terms. *Parrish,* 758 P.2d at 1366 (citing *Flipside,* 455 U.S. at 498-99). The First Amendment demands specificity in a law so that individuals may assess the burden on their rights to free speech and free association and make informed decisions before acting. *Common Sense Alliance v. Davidson,* 995 P.2d 748, 756 (Colo. 2000).

We must construe a constitutional provision consistent with its purpose, "to avoid the shoals of vagueness." *See Buckley v. Valeo,* 424 U.S. 1, 77-78 (1976). Because a constitutional provision must be specific enough to give fair warning of the proscribed conduct and, at the same time, be general enough to address the essential problem under varied circumstances, due process does not require that the provision be drafted with mathematical exactitude. *See People ex rel. City of Arvada v. Nissen,* 650 P.2d 547, 550 (Colo. 1982).

When reviewing a vagueness challenge, the court's duty is to construe the challenged provision "so as to uphold its constitutionality whenever a reasonable and practical construction may be applied to the statute." *Loonan v. Woodley,* 882 P.2d 1380, 1389 (Colo. 1994) (quoting *People v. Buckallew,* 848 P.2d 904, 907 (Colo. 1993)); *see also Buckley,* 424 U.S. at 77-78 (construing provisions of Federal Election Campaign Act of 1971 narrowly to avoid facial invalidity based on grounds of vagueness and overbreadth); *Nat'l Right to Work Legal Defense &*

*Educ. Foundation, Inc. v. Herbert,* ___ F. Supp. 2d ___, 2008 WL 4181336, at *13 (D. Utah Sept. 8, 2008) (similarly imposing narrowing construction on Utah election statutes).

The Independence Institute contends that the definition of issue committee restricts freedom of speech and association because it provides no guidance as to when multi-purpose issue committees must comply with the constitutional and statutory registration, reporting, and disclosure provisions. More specifically, it asserts that the phrase "a major purpose" in article XXVIII, § 2(10)(a)(I) is unconstitutionally vague because it lacks the precision accorded the phrase "the major purpose" in *Buckley.* We disagree.

Because article XXVIII does not define the phrase "a major purpose," we first look at the ordinary and plain meaning of the phrase. While the Independence Institute focuses on the alleged vagueness of "a" and Coffman relies on the apparent clarity of "major" and "purpose," we focus on the language of the entire phrase. This is the approach used by the United States Supreme Court in *Buckley* in defining "*the major purpose*" as the one, central purpose for which an organization is created. *Buckley,* 424 U.S. at 79.

There is no dispute that the phrase "a major purpose" applies when a group has one central purpose to support or oppose a ballot initiative. However, the Independence Institute argues that for

groups that have multiple purposes, the determination of whether one of those purposes is "major" requires a subjective determination of the relative status of that purpose. It argues that article XXVIII does not provide guidance to multi-purpose groups in this regard. Thus, it contends, a multi-purpose organization cannot determine whether any of its purposes is "major," thereby subjecting it to the registration, reporting, and disclosure requirements of article XXVIII and the FCPA.

In *Buckley,* the United States Supreme Court held that defining the phrase "the major purpose" to designate groups that have a single major purpose of campaigning is appropriate to ensure that all entities subjected to the burdens of political committee designation are engaged primarily in regulable, election-related speech. *See North Carolina Right to Life, Inc. v. Leake,* 525 F.3d 274, 289 (4th Cir. 2008) (*NCRL*).

In *NCRL,* the Fourth Circuit struck down as unconstitutionally vague the definition of political committee in a North Carolina statute that, like the constitutional provision at issue here, used the term "a major purpose." The majority held that "if an organization explicitly states, in its bylaws or elsewhere, that influencing elections is its primary objective, or if the organization spends the majority of its money on supporting or opposing candidates, that organization is under 'fair warning' that it may fall within the ambit of *Buckley's* test." *Id.*

However, the *NCRL* court concluded that the North Carolina statute "provides absolutely no direction as to how North Carolina determines an organization's 'major purposes.'" *Id.* The court noted that NCRL had many objectives other than supporting or opposing political candidates. *Id.*

The court continued:

> In this sort of setting, it becomes difficult to understand when the "purpose" of supporting or opposing a candidate becomes "a major purpose." Is a purpose "major" if an organization has only one or two other purposes? Is there a share of total expenditures that determines when a purpose is "major"? An absolute dollar amount? Or perhaps frequency of participation is the relevant criteria: maybe if an organization engages in electoral advocacy three times during one election cycle then the support or opposition of a candidate is "a major purpose"? Given the vagueness of [the statute's] test, it is hard to argue with the plaintiff's contention that, in designating organizations as political committees, North Carolina is essentially handing out speeding tickets without "telling anyone . . . the speed limit."

*Id.* at 290.

Finally, the court noted that a party might be persuaded not to exercise its right to engage in political speech if faced with the costly and time-consuming process of complying with the state's

regulatory requirements. In short, it concluded, "[u]nguided regulatory discretion and the potential for regulatory abuse are the very burdens to which political speech must never be subject." *Id.*

In contrast, the dissenting judge in *NCRL* concluded that the phrase "a major purpose" was not unconstitutionally vague. According to the dissent, whether a regulator is identifying "a major purpose" or "the major purpose" of an organization, he or she considers the same evidence in determining whether electoral advocacy constitutes a considerable or principal portion of the organization's total activities. Thus, the dissent concluded, "an organization is just as able to determine whether electoral advocacy comprises one of its major purposes as it is able to determine whether such activity is 'the major purpose.'" *NCRL,* 525 F.3d at 328-29 (Michael, J., dissenting).

The dispute between the majority and the dissent in *NCRL* can be placed in context by considering the more recent opinion in *National Right to Work Legal Defense & Education Foundation, Inc. v. Herbert,* which reaffirmed "the major purpose" test in *Buckley,* and suggested that some regulation of protected speech might be constitutionally permissible. There, the federal district court struck down as unconstitutional a Utah statute that defines a "political issues committee" as an entity that makes any disbursements to influence, or to intend to influence, directly or indirectly a ballot proposal. ___ F. Supp. 2d at ___, 2008 WL 4181336, at * 17. The court held that

limiting the definition of "political issues committee" as in *Buckley* to entities whose primary or only activity is within the core of Congress's power to regulate politically protected speech is not unconstitutional. It concluded, "[w]ith such a broad definition, Utah does not even attempt to comply with *Buckley's* 'major purpose' requirement, and has pushed the reach of political committee regulation beyond constitutional limits." *Id.*

In *CCEG,* another division of this court recently interpreted the section of article XXVIII concerning electioneering communications. 187 P.3d at 1216. That division narrowly interpreted the "regular business" exception in section 2(7)(b)(III) in a manner consistent with the electorate's intent in adopting it. Similarly, "a major purpose" can be applied to give effect to the electorate's intent in adopting article XXVIII to require disclosure of contributions made to entities that exist to influence election outcomes as to ballot issues, and not to require disclosure of contributions to entities that do not have such influence as a major purpose.

Here, article XXVIII uses "a major purpose" instead of *Buckley's* "the major purpose." Coffman argues, and we agree, that the phrase "a major purpose," is not inherently vague. We perceive no basis to conclude that this phrase is invalid in all respects or that it cannot be constitutionally applied to any multi-issue committee.

To determine whether it has, as "a major purpose," engaging in ballot advocacy, a multi-issue committee, for example, could look to and compare the purposes stated in its charter, articles of incorporation, and by-laws; the purposes of its activities and annual expenditures; and the scope of issues addressed in its print and electronic publications. Constitutional provisions need not be so exact as to eliminate any need for such fact-specific analysis. Thus, the fact that a multi-purpose committee would have to look to its own circumstances does not render the phrase "a major purpose" unconstitutional. To the contrary, the obvious relevance and ready availability of such information means that any multi-issue committee can assess the burden on its rights to free speech and free association and make an informed decision before undertaking ballot advocacy.

Here, the ALJ considered the length of time the Independence Institute had been in existence, its original purpose, its organizational structure, the various issues with which it had been involved, and the amount of money expended on the radio ads in proportion to its annual budget. The trial court relied on this fact-specific inquiry to address the Independence Institute's vagueness challenge.

Accordingly, we conclude that the Independence Institute has not proved that the term "a major purpose" is invalid in all respects and cannot be constitutionally applied in any circumstances. Therefore, we conclude that article XXVIII is not unconstitutionally vague on its face. Thus, as a matter of

law, the trial court correctly granted Coffman's motion for summary judgment on this issue.

B. Overbreadth

The Independence Institute similarly contends that the definition of issue committee in article XXVIII is unconstitutionally overbroad on its face because it reaches groups, like the Independence Institute, that do not have a single major purpose of opposing or supporting ballot initiatives. We disagree.

A law is facially overbroad if it sweeps within its reach a substantial amount of activity that is constitutionally protected. *People v. Shepard,* 983 P.2d 1, 3 (Colo. 1999) (citing *Broadrick v. Oklahoma,* 413 U.S. 601, 615 (1973)). A law that substantially burdens speech and other protected First Amendment conduct is overbroad. *Bd. of Educ. v. Wilder,* 960 P.2d 695, 702-03 (Colo. 1998) (citing *Broadrick,* 413 U.S. 601); *Aguilar v. People,* 886 P.2d 725, 727 (Colo. 1994).

Further, any party can bring an overbreadth facial challenge to protect the rights of third parties whose First Amendment rights may be "chilled" by the law. *People ex rel. Tooley v. Seven Thirty-Five East Colfax, Inc.,* 697 P.2d 348, 355 (Colo. 1985).

Normally, a facial overbreadth challenge must establish that no set of circumstances exists under which the act would be valid. *Wash. State Grange v. Wash. State Republican Party,* ___ U.S. at ___, 128

S.Ct. at 1190. However, in the First Amendment context, a party may establish a law is facially overbroad when a "substantial number" of its applications are unconstitutional in relation to the statute's plainly legitimate sweep. *Id.* at ___, 128 S.Ct. at 1191 n.6 (citing *New York v. Ferber,* 458 U.S. 747, 769-71 (1982)).

A law will be invalidated when it threatens to deter others from engaging in First Amendment protected activities. *People v. Ryan,* 806 P.2d 935, 939 (Colo. 1991). We must be cautious in invalidating a law as facially overbroad and do so only as a last resort. *Id.* (citing *Broadrick,* 413 U.S. at 613).

The Independence Institute argues that article XXVIII is overbroad on its face because if an entity erred on the side of caution, it would report itself as a multi-purpose issue committee and thereby be regulated in its activities that might not otherwise be regulable under the First Amendment. Conversely, if such an entity determined that it did not have a major purpose of ballot advocacy, yet participated in some ballot advocacy, it would then be subject to fines and penalties if it were later determined to fall under the definition of issue committee.

As noted, Coffman promulgated rules to limit the disclosure and termination requirements for multi-purpose issue committees. Those rules, which define a "multi-purpose" issue committee, combined with the fact-specific inquiry discussed in our vagueness analysis, provide sufficient guidance as to when a

multi-purpose group has "a major purpose" of supporting or opposing a ballot measure.

As so interpreted, article XXVIII, section 2(10)(a) does not sweep a substantial amount of protected speech within its application.

We are aware that some multi-purpose organizations may decline to engage in ballot advocacy for fear of being subject to a complaint and attendant administrative proceedings; however, as the dissent in *NCRL* reasoned, we conclude that article XXVIII, section 2(10)(a), does not burden a *substantial* amount of constitutionally protected speech. *NCRL*, 525 F.3d at 289.

Accordingly, we hold that the Independence Institute has not proved the definition of issue committee is invalid in all respects and cannot be constitutionally applied in any circumstances. Therefore, we conclude that the definition is not unconstitutionally overbroad on its face. Thus, as a matter of law, the trial court correctly granted Coffman's motion for summary judgment on this issue.

## V. Burdensomeness of Registration and Disclosure Requirements

The Independence Institute maintains that the registration and disclosure requirements contained in section 1-45-108 and article XXVIII, section 3(9) unconstitutionally burden First Amendment rights.

Although we conclude that the trial court erred in dismissing this claim on the basis that the Independence Institute lacks standing, we also conclude that this claim is now barred by an order of the trial court.

The trial court rejected the Independence Institute's contention "that the registration and reporting requirements of the FCPA are onerous and unduly burdensome because they disproportionately impact small educational groups and issue advocacy organizations."

It then concluded that while the Independence Institute had asserted a facial constitutional claim, upon closer examination the challenge was really an as-applied argument and therefore, the Independence Institute lacked standing to raise it.

On appeal, the Independence Institute asserts that it had standing to bring this claim because standing is assessed at the time a lawsuit is filed, and, when the Independence Institute filed its complaint, it was subject to an actual, ongoing prosecution for violation of the FCPA's reporting requirements.

A party's standing is assessed at the time a lawsuit is filed. *Grossman v. Dean*, 80 P.3d 952, 958 (Colo. App. 2003). Mootness, in contrast, requires courts to look at circumstances that have arisen after a complaint has been filed. *See Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001).

Here, the Independence Institute had standing to assert its claim when it filed the lawsuit because it was then subject to administrative proceedings on the basis of an alleged failure to comply with article XXVIII and the FCPA. Coffman has not asserted that this issue is moot, and therefore, we do not address the question of mootness.

Nevertheless, Coffman argues that we should not address the Independence Institute's claim on the merits because it is barred by an order of the trial court. We agree.

On appeal, the Independence Institute has recast its claim regarding the burdensomeness of the registration and disclosure requirements. It now argues that article XXVIII, section 3(9) and section 1-45-108 unconstitutionally burden groups, like the Independence Institute, that only occasionally engage in ballot issue advocacy but lack a central organizing or major purpose of supporting or opposing ballot issues. It no longer maintains that the reporting and registration requirements are unduly burdensome because they disproportionately impact small educational groups and issue advocacy organizations.

However, on December 14, 2005, about one month after the ALJ's decision, the trial court issued an order noting that the Secretary of State had withdrawn the motion to dismiss as it related to the Independence Institute's facial constitutional challenges. The court added "that its determination in

this action shall be limited to such facial challenges and shall not extend to any as-applied challenges."

On appeal, the Independence Institute now contends that the registration and disclosure requirements "are unconstitutional as-applied to multi-purpose issue committees." Under these circumstances, we conclude that (1) the Independence Institute has modified this claim from a facial to an as-applied challenge to the registration and reporting requirements, and (2) as an as-applied argument, it may not be raised for the first time on appeal. *See Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 (Colo. 1992).

Accordingly, we conclude, albeit for a different reason, that the trial court properly rejected the Independence Institute's burdensomeness claim. *See Stuart v. Bd. of County Comm'rs*, 699 P.2d 978 (Colo. App. 1985) (court may affirm for reasons different from those stated by the trial court).

## VI. Violation of Right to Anonymous Speech and Association

The Independence Institute contends that the disclosure requirements in section 1-45-108 violate the right to engage in anonymous speech and association by requiring those who contribute as little as $20 to support or oppose ballot issues to disclose their identities and addresses on the Secretary of State's website and requiring those who contribute

$100 or more also to disclose their occupations and employers. We disagree.

The United States Supreme Court has recognized that anonymous speech and association are fundamental rights and, outside the context of campaign finance laws that apply to political candidates, a state must demonstrate a compelling interest and narrow tailoring to avoid infringing on those rights. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 343, 347, 357 (1995); *Buckley,* 424 U.S. at 64-66 (compelled disclosure implicates privacy of association and belief); *NAACP v. Alabama,* 357 U.S. 449, 462 (1958).

However, the Supreme Court has also recognized that while disclosure of contributions to candidates and parties may deter some potential contributors, and may even expose some to harassment and retaliation, disclosure requirements often appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist in enacting the Federal Election Campaign Act of 1971. *Buckley,* 424 U.S. at 68.

Therefore, the *Buckley* Court required challengers to disclosure requirements to show "a reasonable probability that the compelled disclosure of a party's contributors' names would subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74. The Supreme Court indicated that such proof could include specific evidence of past or present

harassment of members of an organization or harassment directed against the organization itself. *Id.*

While the Supreme Court has approved disclosure requirements for contributors to political candidates, it has not expressly addressed the propriety of disclosure requirements for contributors to ballot initiatives and referenda. However, as discussed below, we conclude that dicta in several Supreme Court opinions and decisions of other courts support the conclusion that the *Buckley* standard should also apply to ballot initiatives and referenda.

The Independence Institute contends that the *McIntyre* Court made clear that disclosure laws applicable in the context of political candidate elections do not apply in other contexts, such as the election referenda here. We agree with Coffman that the Independence Institute has given too expansive a reading to *McIntyre*. There, the Supreme Court struck down part of an Ohio law that required speakers to reveal their identity on handbills distributed to the public and intended to influence the electoral process. Although the *McIntyre* Court held that such provision of the Ohio law was an impermissible direct regulation of the content of speech, it did not hold impermissible any statute requiring disclosure of contributors to ballot initiatives and referenda.

On the contrary, it acknowledged such disclosure requirements favorably its dicta in *First National*

*Bank v. Bellotti,* 435 U.S. 765 (1978). There, the Supreme Court reversed a judgment of the Supreme Judicial Court of Massachusetts sustaining a state law that prohibited corporate expenditures designed to influence the vote on referendum proposals. 435 U.S. at 767. In *McIntyre,* the Court observed that in *Bellotti,* it had noted the prophylactic effect of requiring identification of the source of corporate advertising. More specifically, the *McIntyre* Court quoted as follows from *Bellotti:* "Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *McIntyre,* 514 U.S. at 354 n.18.

Similarly in *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299-300 (1981), the Supreme Court held, while striking down a $250 limit on contributions to committees formed to support or oppose ballot measures, that "[t]he integrity of the political system will be adequately protected if contributors are identified in a public filing revealing the amounts contributed; if it is thought wise, legislation can outlaw anonymous contributions."

In *Buckley v. American Constitutional Law Foundation, Inc.,* 525 U.S. 182 (1999) (*ACLF*), the Supreme Court struck down a provision of a Colorado statute requiring, among other things, that petition circulators wear identification badges. Nevertheless, the *ACLF* Court noted that "[t]hrough the disclosure

requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told 'who has proposed [a measure],' and 'who has provided funds for its circulation.'" *ACLF*, 525 U.S. at 203.

Further, other courts have expressly held that the *Buckley* standard applies to ballot initiatives and referenda. In *California Pro-Life Council, Inc. v. Getman,* 328 F.3d 1088, 1101 (9th Cir. 2003), the court held that express ballot measure advocacy may be regulated, provided that the state has a compelling interest and that the regulations imposed are narrowly tailored to advance the relevant interest. *See also Nat'l Right to Work Legal Defense & Educ. Foundation,* ___ F. Supp. 2d at ___, 2008 WL 4181336, at *9; *Richey v. Tyson,* 120 F. Supp. 2d 1298, 1310 (S.D. Ala. 2000); *Volle v. Webster,* 69 F. Supp. 2d 171, 173-74 (D. Me. 1999).

Based on the reasoning in the above cases, we conclude that the disclosure requirements contained in § 1-45-108 do not violate the right to engage in anonymous speech and association and that disclosure of the identity of contributors to ballot measures may constitutionally be required under the standards set forth in *Buckley.* Specifically, we note, as did the trial court, that the Independence Institute has not alleged that compelled disclosure of its contributors subjected them to threats, harassment, or reprisals from other government officials or private parties. Accordingly, we conclude that the trial court

did not err in rejecting the Independence Institute's claim for relief on this issue.

VII. Attorney Fees

The Independence Institute requests that, pursuant to C.A.R. 39.5, we award it attorney fees "as provided for by Colorado law." Because the Independence Institute has not prevailed in this litigation, we deny its request.

The judgment is affirmed.

JUDGE CARPARELLI concurs.

JUDGE CONNELLY specially concurs.

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JUDGE CONNELLY specially concurring.

The majority upholds Colorado's financial disclosure requirements on "issue committees" supporting or opposing ballot issues. I concur in the results reached by the majority but write separately because my analysis differs in some respects.

As the majority explains, this is a constitutional challenge to Colorado's requirements on their face rather than as applied to a particular organization. A facial challenger has the daunting burden of showing "no set of circumstances exists under which the Act would be valid, *i.e.* that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, ___ U.S. ___, 128

S. Ct. 1184, 1190 (2008) (internal punctuation omitted); *compare McConnell v. FEC*, 540 U.S. 93 (2003) (upholding facial constitutionality of Bipartisan Campaign Reform Act of 2002 provision outlawing certain corporate "electioneering communications"), *with Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410 (2006) (holding *McConnell* did not foreclose as-applied challenges to same provision), *and FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. ___, 127 S. Ct. 2652 (2007) (holding same provision unconstitutional as applied).

Colorado's definition of an issue committee is not vague "in all of its applications," *Washington State Grange*, ___ U.S. at ___, 128 S. Ct. at 1190. The vagueness challenge turns on one word: "a" rather than "the" before "major purpose." Independence Institute contends *the* major purpose of an organization "is easily determinable in advance," but *a* major purpose is "inherently vague." Such a categorical contention is demonstrably incorrect. Take, for example, an "organization that has four equally important purposes, only one of which is electoral advocacy." *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 303 (4th Cir. 2008) (*NCRL*). It will be easier, not harder, to determine "a" rather than "the" major purpose of that organization.

I cannot subscribe to the discussion in the majority opinion that in my view goes further than necessary or appropriate to reject this facial challenge. The majority opinion contains an extended discussion of cases that have "narrowly" construed

provisions to avoid vagueness problems, and it outlines factors pertinent to a "fact-specific inquiry" into whether an organization is or is not an issue committee. But in my view the Colorado definition easily withstands a facial challenge without any narrowing construction beyond what the Secretary of State already provided. Discussion of factors relevant to determining whether an organization is an issue committee should be reserved for a case in which the legal definition must be applied to a particular organization under a given set of facts. In such a case, a multi-purpose organization would remain free to raise an as-applied constitutional challenge.

Next, I agree with the majority's rejection of the overbreadth challenge but again remain concerned with any suggestions the challenge fails because of some judicial interpretation of the definition. Administrative regulations, not judicial construction, have obviated the only real overbreadth concern by requiring multipurpose issue committees to report only ballot-specific contributions and expenditures. Secretary of State Campaign and Political Finance Rules 4.15, 8 Code Colo. Regs. 1505-6.

The Supreme Court has not – in *Buckley v. Valeo*, 424 U.S. 1 (1976); in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); or in any other decision – accorded talismanic constitutional significance to whether "the" or "a" modifies major purpose. To the contrary, in a related context, it has upheld regulation of lobbyists where "*one of the main purposes* of such 'person,' or *one of the main purposes*

of such contributions" was to influence legislation. *United States v. Harriss,* 347 U.S. 612 (1954) (emphases added).

Next, I concur with the majority's holding that the reporting requirements do not violate the First Amendment right to speak anonymously on ballot issues. I write separately to opine that Independence Institute's contentions on this point are more substantial than its vagueness and overbreadth challenges.

Anonymous speech has a long and vital tradition predating the Constitution (as in the *Federalist Papers*), and at least in some circumstances it is constitutionally protected. *See McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 341-57 (1995). Moreover, one of the most compelling interests justifying disclosure of political candidate contributions, that of "deterring actual corruption and avoiding any appearance thereof," *McConnell,* 540 U.S. at 196, does not apply to ballot issues. *See California Pro-Life Council, Inc. v. Randolph,* 507 F.3d 1172, 1179 n.9 (9th Cir. 2007). The only applicable state interest – educating the electorate about financial interests behind ballot issues – is much less weighty than the interest in avoiding actual or apparent corruption of politicians. *See Common Sense Alliance v. Davidson,* 995 P.2d 748, 755 (Colo. 2000) ("identity of supporters and opponents of a ballot initiative would be potentially helpful to the electorate, but the information is not nearly as critical as the identity of candidate supporters").

Nonetheless, as set forth in the majority opinion, Supreme Court dicta and lower court holdings have approved ballot issue disclosure requirements. Under these cases, a state's interest in disclosing financial interests behind ballot issues is sufficiently compelling (albeit less so than in the political candidate context) to overcome the right to speak anonymously. I therefore concur in the majority opinion on this point and in the rest of its opinion rejecting Independence Institute's case-specific appellate arguments.

District Court, City and
County of Denver, Colorado
1437 Bannock Street
Denver, Colorado 80202

Plaintiff: INDEPENDENCE INSTITUTE, a Colorado non-profit corporation

v.

Defendant: MIKE COFFMAN, in his official capacity as SECRETARY OF STATE, STATE OF COLORADO

Case Number: 05CV7604

Courtroom: 7

**ORDER RE: CROSS MOTIONS FOR SUMMARY JUDGMENT**

(Filing Date: May 3 2007)

This Matter is before the Court pursuant to Plaintiff and Defendant's Cross Motions for Summary Judgment filed July 21, 2006 and August 7, 2006 respectively. Oral argument on the Motions was held on January 26, 2007 with proposed orders to follow. The Court, having considered the pleadings, the evidence presented, the file, and applicable authorities, hereby Finds and Orders as follows:

## INTRODUCTION AND BACKGROUND

1. In 2005, a complaint was submitted by Richard Evans to the Colorado Secretary of State against the Independence Institute ("Institute") alleging, *inter alia*, that the Institute had violated

Article XXVIII of the Colorado Constitution ("Article XXVIII"), which governs campaign finance laws and portions of Colorado's Fair Campaign Practices Act, C.R.S. 1-45-101, *et seq.* ("FCPA") by failing to register as an "issue committee" or file the statutorily required reports. The Institute then filed this action in District Court challenging the constitutionality of the relevant provisions of Article XXVIII and the FCPA. The motions for summary judgment followed.

2. "The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial, when as a matter of law, based on undisputed facts, one party could not prevail." *Curragh Queensland Min. Ltd. v. Dresser Industries,* 55 P.3d 235, 239 (Colo. App. 2002) (quoting *Peterson v. Halsted,* 829 P.2d 373,375 (Colo. 1992). A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that that the moving party is entitled to judgment as a matter of law." C.R.C.P. 56(c); *Casey v. Christie Lodge Owners Ass'n., Inc.,* 923 P.2d 365, 366 (Colo. App. 1996). Here, the parties agree to the facts and the matter is appropriate for summary judgment determination.

## VAGUENESS

3. Plaintiff asserts that the definition of "issue committee" under Article XXVIII Section 2(10)(a)(I) is unconstitutionally void for vagueness. In order to mount a facial constitutional challenge based upon vagueness, Plaintiff must show that the disputed language is "so utterly void of a standard of conduct that it simply has no core and cannot be validly applied to any conduct." *United States v. Powell*, 423 U.S. 87, 96 (1975). The mere fact that "clearer and more precise language" might have been used does not render the provision unconstitutional. *Id.* at 94. Article XXVIII defines an "issue committee" as one which has a "major purpose" of supporting or opposing a ballot issue or question. The Institute argues the definition of "issue committee" is unconstitutionally vague because there is no clear guidance as to how to determine a group's "major purpose." In particular, Plaintiff argues that an "issue committee" may have multiple "major purposes" and therefore no group will be able to determine if it is subject to the requirements of Article XXVIII prior to speaking.

4. How to determine a group's "major purpose" was addressed by the Administrative Law Judge ("ALJ") in the administrative complaint proceedings involving these parties. It is apparent from the ALJ's ruling that discerning a group's "major purpose" did not prove overly difficult. The ALJ employed a totality of the circumstances analysis in arriving at the conclusion that the Institute did not have a "major purpose" that would render it an "issue committee."

Additionally, the particular phrase "major purpose" is not a novel term in the campaign finance context and numerous other courts have been able to interpret the phrase. *See, e.g. McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003); *Buckley v. Valeo*, 424 U.S. 1 (1976). Therefore, the Court finds that the definition of "issue committee" is not unconstitutionally vague.

OVERBREADTH

5. Plaintiff also argues that the definition of "issue committee" under Article XXVIII is overbroad because it extends to organizations whose purpose goes beyond just supporting or opposing ballot issues. Plaintiff further states that the disclosure and registration requirements of the FCPA are similarly overbroad because they require compliance from groups not engaged solely in campaigning. Language that appears to be overbroad may still be constitutional if the scope can be narrowed by a limiting instruction. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). Here, the Colorado Secretary of State has issued two rules that narrow the constitutional definition of "issue committee" and limit the type of groups that must comply with the FCPA requirements. Rules 3.8 and 4.16 of the Rules Concerning Campaign and Political Finance address Plaintiff's argument pertaining to organizations that may have multiple purposes and therefore be considered an "issue committee" in certain circumstances. Rule 3.8

defines a "multi-purpose issue committee" and addresses its formation and termination. Rule 4.16 sets out the specific reporting requirements of a "multi-purpose issue committee" and distinguishes such requirements from those of "pure issue committees." Therefore, the Court finds that neither the definition of "issue committee" nor the FCPA's reporting, registration, and disclosure requirements are unconstitutionally overbroad.

## FAIR CAMPAIGN PRACTICES ACT – BURDENSOME

6. Plaintiff's next contention is that the registration and reporting requirements of the FCPA are onerous and unduly burdensome because they disproportionately impact small educational groups and issue advocacy organizations. Plaintiff offers evidence that compliance with the FCPA's requirements regarding separation of funds used to support or oppose ballot issues and the filing of registration and termination statements will be a "nightmare" for small groups. Pl. Cross-Motion for Summ. Judgment at 25. However, the Institute has brought a facial constitutional claim on the basis that the challenged provisions are incapable of being applied constitutionally in any context. A facial challenge is distinguishable from an "as applied" challenge wherein an otherwise constitutional statute may be found to be unconstitutional under a particular set of circumstances. *Sanger v. Dennis*, 148 P.3d 404 (Colo.App. 2006). Such a challenge may only

be raised by a party who has actually been adversely impacted by the statute and therefore has standing. Plaintiff's argument regarding the burden placed on small groups by the FCPA's reporting requirements is, upon closer examination, an "as applied" argument and therefore, the Institute lacks standing to raise this argument.

FAIR CAMPAIGN PRACTICES ACT – CHILLING

7. Finally, Plaintiff argues that the statutory disclosure provisions of the FCPA violate the U.S. Constitutional First Amendment rights to anonymous speech and association. Plaintiff relies on the line of Supreme Court cases stemming from the decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) which stand for the proposition that some laws may be struck down simply because they threaten to chill speech. *Id.* at 612. However, these cases also state that mere predictions of the effects of prohibiting certain speech cannot justify invalidating a statute on its face if the regulated conduct is within the State's power to proscribe. *Id.* Additionally, the Court has found that the reasonable probability that disclosure of contributors' names will subject them to threats or harassment may be shown in a variety of ways, including by specific evidence of past incidents or specific manifestations of public hostility. *Buckley* at 74. Plaintiff here has failed to offer sufficient evidence, beyond speculation, that such threats exist.

Therefore, the Court hereby GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment, each side to bear their own fees and costs.

Dated this 3rd day of May 2007.

By the Court:

/s/ Herbert L. Stern III
Herbert L. Stern III
District Court Judge
(For Courtroom 7)

cc: Attorney for Plaintiff
Attorney for Defendant

DISTRICT COURT, CITY AND
COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, CO 80202

**Plaintiff:**

INDEPENDENCE INSTITUTE, a Colorado non-profit corporation

v.

Case Number: 05CV7604

Ctrm: 7

**Defendants:**

RICHARD EVANS and GIGI DENNIS, in her capacity as SECRETARY OF STATE, STATE OF COLORADO

**ORDER**
**(Re: Secretary of State's Motion to Dismiss)**
(Filing Date: Dec 14, 2005)

THIS MATTER is before the Court on the Secretary of State's Motion to Dismiss. Upon consideration of the motion, the response and reply thereto, and having reviewed the Court's file and applicable authorities and being sufficiently advised in the premises, the Court finds and orders as follows.

In light of the resolution of this matter by the administrative law judge, the Secretary of State has withdrawn its motion as it relates to Plaintiff's facial challenges. The Court further agrees that its determination in this action shall be limited to such facial challenges and shall not extend to any as-applied challenges.

Accordingly, the motion is granted in part.

**SO ORDERED** this 14th day of December, 2005.

**BY THE COURT**

/s/ Martin Egelhoff

**Martin Egelhoff**
**District Court Judge**

**BEFORE THE SECRETARY OF STATE**
**STATE OF COLORADO**

**CASE NO. OS 20050020**

**AGENCY DECISION**

**IN THE MATTER OF THE COMPLAINT FILED BY RICHARD EVANS REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY THE INDEPENDENCE INSTITUTE AND VOTE NO; IT'S YOUR DOUGH**

This matter is before the Office of Administrative Courts ("OAC") on the complaint of Richard Evans ("Complainant") against the Independence Institute ("Institute") and Vote No; It's Your Dough ("Vote No" or "Committee"). The complaint was filed with the Colorado Secretary of State ("Secretary") on August 4, 2005. On August 5, 2005, the Secretary referred the complaint to OAC as required by Colo. Const. art. XXVIII, § 9(2)(a). Complainant is represented by Mark G. Grueskin, Esq. and Edward T. Ramey, Esq. The Institute is represented by Richard C. Kaufman, Esq. and Shayne M. Madsen, Esq. The Committee is represented by Shawn Mitchell, Esq. Hearing on the complaint was conducted in Denver, Colorado, on October 12, 2005, before Administrative Law Judge ("ALJ") Michelle A. Norcross. The hearing was digitally recorded in Courtroom 1. At hearing, the ALJ admitted Complainant's exhibits 1 through 32, 34

through 45, and the institute's exhibits R-1 through R-9 and R-11 through R-20 into evidence.[1] The record was held open until October 19, 2005 for receipt of closing briefs.

## Parties' Positions

**Complainant:** Complainant alleges that the Institute became an "issue committee" as defined in the Colorado Constitution by engaging in efforts to oppose ballot measures C and D ("Referenda C and D") including paying for and airing three radio advertisements ("ads") concerning Referenda C and D. And, as such, the Institute is subject to the disclosure requirements of the Fair Campaign Practices Act ("FCPA") and must disclose the name of the donor(s) who paid for the ads and/or made contributions to the Institute. Complainant argues that the Institute has violated the Colorado Constitution and the FCPA by failing to register as an issue committee, by failing to disclose contributions and expenditures for its activities, and by failing to open a separate bank account for its C and D activities.

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[1] On October 21, 2005, Complainant's counsel submitted the following supplemental exhibits addressed at hearing: exhibits used at the deposition of Mr. Jon Caldara that were not appended to the deposition submitted at hearing (Mr. Caldara's deposition is admitted as exhibit 45); a copy of Judge Egelhoff's decision denying the Institute's request for preliminary injunction (Judge Egelhoff's decision is admitted as exhibit R-20); and a Word compatible version of exhibit 36 that includes three radio advertisements and one television advertisement.

With respect to Vote No, Complainant alleges that the Committee violated the Colorado Constitution and the FCPA by failing to report all the contributions it received from the Institute.

**The Institute:** The Institute admits that it ran three radio ads and published materials on its website concerning Referenda C and D. The Institute denies that it has a major purpose of opposing Referenda C and D and further denies that its radio ads and/or website sponsorship constitute express advocacy. Therefore, it contends that it is not an issue committee and is not subject to the disclosure requirements of the FCPA. The Institute has also raised constitutional challenges to Article XXVIII of the Colorado Constitution and the FCPA that are the subject of a complaint filed in Denver District Court.

**Vote No:** The Committee denies that it received any non-reported contributions from the Institute. It argues that it has fully complied with Colorado's campaign laws by properly registering as an issue committee and accurately reporting its contributions and expenditures, including all contributions it received from the Institute.

## Pre-hearing Motions

*Complainant's Motion to Continue.* This case was originally set for hearing on August 15, 2005. Complainant filed a motion to continue the August 15 hearing on the basis of a medical emergency on the part of counsel. The motion was unopposed and based

upon a thirty-day extension of time requested by the Institute the case was reset for hearing on October 5, 2005.

*Complainant's Motion to Accept First Amended Complaint.* On September 26, 2005, Complainant filed a motion to amend his complaint along with his First Amended Complaint. The only change from the original complaint is the addition of Complainant's mailing address and the addition of Vote No in the caption and in the introductory paragraph of the complaint. In all other respects, the First Amended Complaint is identical to the original complaint and no additional claim of relief is requested as a result of the amendments. Neither the Institute nor Vote No objected to the motion. Accordingly, on September 30, 2005, the ALJ granted Complainant's motion and accepted Complainant's First Amended Complaint.

*Institute's Motion to Stay.* On September 27, 2005, the Institute filed a Motion to Stay Administrative Proceedings, which was joined by Vote No. The Institute requested a stay of the administrative proceedings for the following reason: On September 26, 2005, the Institute filed a complaint in Denver District Court raising facial constitutional challenges to Article XXVIII of the Colorado Constitution and statutory provisions of the FCPA, specifically, the Institute challenges the definition of an "issue committee" and portions of the FCPA's disclosure requirements. The Institute argued that absent a stay of the administrative proceedings it could not obtain complete and adequate remedies since the

matters in controversy are matters of law that the agency lacks the jurisdiction to determine.

On September 28, 2005, Complainant filed a response opposing the request for a stay. The Institute filed its reply on September 30, 2005. The ALJ convened a telephone hearing on September 30, 2005, to take argument on the motion. Following oral argument, the ALJ denied the Institute's motion to stay the administrative proceeding for the following reasons: (a) OAC has jurisdiction to hear and rule on the merits of complaint; (b) OAC is charged with holding a hearing and rendering a decision in these cases on an expeditious basis; and (c) the ALJ has the authority and discretion to fashion a remedy, including a protective order, to protect the Institute from disclosure of its members and/or donors during the administrative process, as well as the authority and discretion to stay enforcement of any order requiring disclosure pending any appeal of an adverse order.

*Complainant's Motion to Compel and for Sanctions.* On September 29, 2005, Complainant filed a motion to compel Ethan Eilon, a part-time volunteer for the Vote No committee, and the custodian of the records for Vote No, to provide testimony and produce documents pursuant to subpoenas served on September 22, 2005. During the telephone hearing on September 30, 2005, Complainant's counsel, Mr. Grueskin, informed the ALJ that the parties had come to an agreement regarding the deposition of Mr. Eilon as well as the production of documents referenced

in the motion to compel, rendering the motion to compel moot. Mr. Grueskin requested that he be allowed to renew his request for sanctions at the merits hearing and that the ALJ consider his motion at that time. The ALJ granted the request to delay a ruling on the motion for sanctions. Complainant did not renew his request for sanctions at the October 12 hearing. Accordingly, the ALJ denies Complainant's motion for sanctions as moot.

*Institute's Motion to Vacate October 12, 2005 Hearing.* On October 5, 2005, the Institute filed a motion to vacate the October 12, 2005 hearing and requested a status conference to be held on October 12, 2005. Complainant filed an opposition to the motion on October 6, 2005. The basis for the motion to vacate was two-fold: (a) Jon Caldara, President of the Institute, and the primary witness in the case was unavailable to appear on October 12, 2005; and (b) the earliest date available in Denver District Court for a hearing on the Institute's motion for preliminary injunction was October 11, 2005. On October 11, 2005, the ALJ set up a telephone hearing with the parties to discuss the pending motion. However, the ALJ was unable to proceed with the hearing because the parties were unavailable; they were in Denver District Court presenting argument on the motion for preliminary injunction. On the morning of October 12, 2005, the parties appeared before the ALJ and informed her that Denver District Court Judge Martin Egelhoff denied the motion for preliminary injunction. The Institute withdrew its motion to

vacate and the case proceeded to hearing on the merits.

**Motions made at Hearing**

*Complainant's Request for Disclosure of Donor(s) for Radio Ads.* Complainant requested that the ALJ allow him to inquire of Mr. Caldara the specific identity of the donor(s) who paid for and/or contributed money to the Institute for the radio ads that are the subject of this complaint. The Institute objected. The ALJ denied the request on the basis that, prior to requiring disclosure of any contributors, Complainant must first establish that the Institute is an issue committee. If Complainant met that burden, the ALJ, in her decision, would order the Institute to fully comply with the FCPA's disclosure requirements. The ALJ further ruled that, prior to such a determination, disclosure of the Institute's donors and/or contributors would be premature and could result in irreparable harm to the Institute and its members.

*Motion for Directed Verdict.* At the close of Complainant's case-in-chief, Vote No moved for dismissal of the complaint on the basis that Complainant failed to prove, by a preponderance of the evidence, that either the Institute or Vote No violated Colorado's campaign laws. The ALJ denied the motion, but agreed to accept counsel's legal arguments for purposes of rendering the Agency Decision.

**Post-hearing Motion**

*Vote No's Motion for One-Night Extension of Time to File Closing Brief.* On October 19, 2005, Vote No requested a one-night extension to file its closing brief. Along with the motion, it filed its closing brief on the morning of October 20, 2005. In its motion, Vote No represents that Complainant objects to the one-night extension; however, the ALJ did not receive Complainant's response. On October 20, 2005, the ALJ granted Vote No's motion and accepted its written closing argument as part of the record.

## FINDINGS OF FACT

Based upon the evidentiary record, the ALJ makes the following Findings of Fact:

*The Institute*

1. The Institute was founded in 1985. It is registered with the Internal Revenue Service as a 501(c)(3), non-partisan, non-profit policy research organization. It is located in Golden, Colorado and its current President is Jon Caldara.

2. As a non-profit organization, the Institute receives its funding from individual monetary donations. The donations are tax deductible. A gift of $100 allows an individual to become a member of the Institute and receive free weekly e-mails, newsletters, copies of policy papers and invitations to special events. Members who contribute $1,000 or

more become members of the "Circle of Independence" and receive invitations to special and exclusive events with state and national policy leaders. Aside from a small monetary donation, there are no formal membership requirements. The Institute also accepts charitable and anonymous donations. The Institute's budget for the prior year was $1 million. Mr. Caldara estimates that the Institute's current-year budget will be between $1.3 and $1.4 million.

3. Since 1985, it has been the mission of the Institute to help promote the ideals of limited government in free markets and to promote personal and economic liberty. In furtherance of this mission, the Institute provides policy makers, legislators and citizens of Colorado with educational materials addressing a broad spectrum of policy issues, including public education, transportation, and taxation.

4. Since its inception, the Institute has used all available media to further its educational mission, including, but not limited to, disseminating "issue papers" and "issue backgrounders," publishing weekly opinion-editorials ("op-eds"), establishing a website, and hosting a weekly television interview program on Colorado Public Television, KBDI Channel 12, called *Independent Thinking*.

5. The vast majority of the Institute's material is available on its website, www.i2i.org. The Institute also hosts other websites including www.taxincrease.org. Taxincrease.org was created several years ago by the Institute to provide information to the public

about issues specifically related to taxation and government spending.

6. In addition to its publications, the Institute also presents speeches, publishes reviews, hosts symposia, produces advertising, holds public debates, hosts monthly member events, presents legislative briefings, and presents public forums. The Institute focuses on several core policy areas through its six "policy centers." The Institute's policy centers include: (a) the Education Policy Center; (b) the Health Care Policy Center; (c) the Second Amendment Project; (d) the Center for the American Dream; (e) the Campus Accountability Project, and (f) the Fiscal Policy Center. Each policy center is headed by its own director and supported by one or more policy analysts and research associates. These six policy centers have been in existence for many years.

7. The Education Policy Center focuses on school choice, school accountability and teachers' rights. The Health Care Policy Center focuses on free-market alternatives to problems with the current health care system. The Second Amendment Project addresses legal precedents, news, and opinions providing a constitutional prospective on gun control and gun rights. The Center for the American Dream addresses planning efforts that attempt to engineer lifestyles through subsidies, regulation and limits on personal and economic freedom. The Campus Accountability Project serves as a watchdog to ensure universities observe and protect the individual rights of faculty, staff and students. And, the Fiscal Policy

Center works to find a balance between taxation and liberty and, since 1992, to defend the Taxpayer's Bill of Rights ("TABOR").

8. Including Mr. Caldara, the Institute has fourteen senior staff involved in its six policy centers. Much of the material used by the Institute comes from its research fellows, staff, and contributing professors. In the last several years, the Institute has published over twenty issue papers dealing with topics such as public school reform, improving transportation, balancing Colorado's budget, improving the state's prison system, promoting privatization of government functions, and implementing taxing and spending limits.

*Referenda C and D*

9. In the spring of 2005, the General Assembly referred two measures to be included on the ballot for the November 2005 election. These measures are known as Referenda C and D. Referenda C and D impact TABOR; if passed, they permit the state to retain funds that would otherwise be returned to the citizens of Colorado through tax refunds and permit the state to issue bonds for specified projects.

10. The Institute, through its Fiscal Policy Center, has a twenty-one year history of involvement in various taxation issues, which, for the past five months, have included C and D. As far as the Institute is concerned, C and D have no positive impacts on the citizens of Colorado. Some of the activities

undertaken by the Institute concerning C and D include, issuing op-ed pieces, posting polling results, analyzing the state's budget proposals, and hosting debates. Through these activities, the Institute has attempted to educate the public about C and D and encouraged voters to learn more about the measures.

11. For the past five months, on its website www.taxincrease.org, the Institute has published documents relating to Referenda C and D and has included reports and information from other sources regarding C and D, including links to other policy think tanks (Americans for Tax Reform, Colorado Club for Growth, Freedom Works, and the Heritage Foundation) as well as groups supporting C and D (the Bell Policy Center and Proponents of C and D).

12. Mr. Caldara serves as the spokesman for the Institute on C and D and has participated in the writing of press releases for the Institute as well as the drafting of three radio ads relating to Referenda C and D. Since C and D were referred, Mr. Caldara has spent one-third of his time as President of the Institute on activities related to C and D. And for the past several months, the Institute's Fiscal Policy Center has been focused on C and D.

*Radio Ads*

13. In the summer of 2005, the Institute was involved in the preparation and airing of three radio ads concerning Referenda C and D. The first radio ad is called, "The Sky is Falling." The second radio ad is

called, "Hi Ho, it's off to Tax we go." And the third radio ad is called, "Whoops there Goes Another One."

14. "The Sky is Falling" aired as follows:

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| Background Crowd | (Muted screams of terror) |
| 1st Male Voice | Aagh, the State's out of money. Government is starving. We gotta pass Referendum C this fall or we're doomed. It's a crisis! |
| Female Voice | Crisis? Hardly. Colorado's budget has never been larger. |
| 1st Male Voice | Huh? |
| Female Voice | The Chicken Littles claim the state's sky high budget is falling. But the fact is, Colorado's budget is at a record high. They have so much money, they just gave across-the-board pay increases to all government employees. You call that a budget crisis? |
| 1st Male Voice | But they say C isn't a tax increase. |
| Female Voice | Not a tax increase? It takes away not most, but all of our tax refunds for the next 5 years. That's billions from us taxpayers. That, my friend, is what we call a tax increase. And Ref C ratchets up government spending forever. |
| 1st Male Voice | Forever? |

| | |
|---|---|
| Female Voice | It's not just a five-year tax increase, it's a forever tax increase. |
| 1st Male Voice | Oh, now I am scared. |
| 2nd Male Voice | Learn more about the Taxpayers Bill of Rights and this Fall's Referendum C at www.taxincrease.org. Paid for by the Independence Institute. |

15. The Institute paid for the production and airing of "The Sky is Falling" with funds from its corporate account. The production and airtime costs totaled $35,000.

16. The second ad, "Hi-Ho, it's off to Tax we go", aired as follows:

| | |
|---|---|
| Chorus | (Sung to the tune of Disney's 7 dwarves Hi-Ho song) Hi-ho, hi-ho, it's off to tax we go, more for government, less for families (sound of cash register ka-ching) Hi-ho, it's off to tax we go . . . |
| 1st Male Voice | Stop that. Do you want the voters to learn the truth about Referendum C? |

| | |
|---|---|
| 2nd Male Voice | The truth about what's really inside Referendum C? The tax and spenders want billions more of your tax dollars to grow a state government that refuses to show spending restraint and common sense. For example, the *Rocky Mountain News* reports, the state spent over $600 per truck for an oil change. We've all been told C is more than $3 billion tax increase over 5 years, but it's even worse. C is a Trojan horse concealing the forever tax increase, forever raising how much of your money the state can spend. Colorado's budget increased over 7% from last year, twice as fast as the cost of living. |
| Chorus | (Singing) It's off to tax we go. |
| 2nd Male Voice | Learn more about Referendum C, the forever tax increase, at taxincrease.org. Paid for by the Independence Institute. |

17. The third ad, "Whoops there Goes Another One", aired as follows:

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|---|---|
| 1st Male Voice | First, the politicians tried to tell us, Ref C is not a tax increase. |
| 2nd Male Voice | (Sung to tune of Oops there goes another Rubber Tree Plant) Oops there goes another one. |

| | |
|---|---|
| 1st Male Voice | But the indisputable truth, C is more than a three and half billion dollar tax increase in just the first five years, permanently raising job-killing taxes. Now the politicians say C is required, or school, roads and children will face spending cuts. |
| 2nd Male Voice | (Singing) Whoops there goes another one. |
| 1st Male Voice | But even their own Budget Office proves that statement false. And how C's permanent tax increase would be spent is completely up to the whim of the politicians. If the past is a guide, that means more thousand dollar office chairs and half a million dollar state-paid bar tabs. |
| 2nd Male Voice | (Singing) Whoops there goes another one. |
| 1st Male Voice | But C would increase taxes more than $3,200 per family of four. It's basic economics. If you want to create jobs, you cut taxes. If you want to kill jobs, you raise taxes. Learn more about C at taxincrease.org. Paid for by the Independence Institute. |

18. The second and third radio ads ("Hi Ho, it's off to Tax we go" and "Whoops there Goes Another One") were paid for, on behalf of the Institute, by an undisclosed not-for-profit agency. These two ads were

in-kind contributions made to the Institute by a single donor. Mr. Caldara assisted in the writing of the scripts for radio ads two and three. The Institute accepted an in-kind contribution of $100,000 from the unnamed donor for the production and airtime costs associated with the second radio ad. At the time of hearing, Mr. Caldara had not yet determined the exact value of the in-kind contribution associated with the production and airtime costs of the third radio ad, but believed it would be similar to the cost of the second ad ($100,000).

19. These three radio ads are available on the Institute's website. The Institute produced and aired the radio ads as part of its education campaign. These ads were produced for the benefit of the Institute and are publicly available on its website.

20. The Institute does not charge anyone or receive compensation from any persons, agencies, groups who access the Institute's website.

*Focus of the Institute*

21. The Institute, through these ads and other means, continued to be involved in C and D; however, Referenda C and D were not the sole or main focus of the Institute and not the only concern of its members. Referenda C and D are only a recent focus of the Institute.

22. Since the referral of C and D, the Institute's five other policy centers have continued to work on

topics and issues not involving C and D or TABOR. And prior to the referral of C and D, the Institute was actively engaged in efforts to educate the public about Colorado's budget, government spending, and the effect TABOR has had on both.

23. Since May 16, 2005, the Institute has produced thirty op-ed pieces on various topics including: school funding, government spending as affected by Referendum C, state projected budget shortfalls, the appointment of school officials, and state's rights as affected by recent Supreme Court decisions. Only two of the thirty op-ed articles posted on the Institute's website since May 16, 2005, discuss Referendum C.

24. For twenty-one years, the Institute has provided educational research and analysis of topics of public concern from a free-market, pro-freedom perspective through its six core policy centers. There is no evidence that the primary mission of the Institute will change following the November 2005 election. There is also no evidence that it will alter its fundamental policies regardless of the fate of C and D. Finally, there is no evidence that the Institute will dissolve or in any other way cease to continue after the voters have cast their votes for C and D.

25. Over the years, different issues have taken on varying priorities at the Institute. For the past five months, Referenda C and D have taken priority over other issues, but they are not a major purpose or focus of the Institute.

*Vote No Issue Committee*

26. In the spring of 2005, the Institute established a committee called Vote No, it's Your Dough. Vote No is registered with the Secretary as an issue committee. Because it is the policy of the Institute to educate, not advocate, Mr. Caldara formed the Committee as a vehicle to expressly advocate the defeat of C and D. Mr. Caldara serves as the chairman and spokesman for Vote No.

27. In his capacity as chairman of Vote No, Mr. Caldara has met with representatives of other issue committees and organizations that oppose C and D. He has appeared publicly to oppose these ballot issues, helped raise money for the Committee, assisted in preparing press releases, and performed other types of grass-root campaign efforts for the Committee.

28. Elizabeth Clark is the Committee's register agent; she is a volunteer. The Committee has only one paid staff member, John Reynolds. Mr. Reynolds receives compensation from the Committee for his fieldwork in Northern Colorado. The remainder of the work done on behalf of the Committee is performed by volunteers. Several Committee volunteers are employees of the Institute. Other than Mr. Reynolds, the volunteers are not paid by the Committee or the Institute for their time spent on Committee activities.

29. One of the Committee's key volunteers is Ethan Eilon. Mr. Eilon has helped set up debates, delivered "No Refund For You!" bumper stickers, and

been in contact with people to help the Committee make its presentations. Mr. Eilon has also, on occasion, been the press contact and accepted contributions for and on behalf of the Committee.

30. As Committee chairman, Mr. Caldara has fielded occasional calls about Referenda C and D from his office at the Institute. He has also used the Institute's office equipment (i.e., fax machine, copier, and computers) on occasion for the benefit of Vote No for such activities as responding to e-mails and making copies of Vote No materials. Mr. Caldara is not compensated by the Institute or the Committee for his efforts as chairman of Vote No. Mr. Caldara's services as chairman of the Committee are provided on a volunteer basis. For the past several months, he has spent about 2 hours a day assisting the Committee.

31. The Committee accepted its first monetary contribution on June 3, 2005. It has filed Reports of Contributions and Expenditures with the Secretary for the following periods: May 27, 2005 – June 25, 2005; June 26, 2005 – July 26, 2005; July 27, 2005 – August 31, 2005; September 1, 2005 – September 14, 2005; and September 15 – September 28, 2005. These were the only reports available at the time of hearing.

32. In its report for the reporting period July 27, 2005 – August 31, 2005, Vote No disclosed a $250 non-monetary contribution from the Institute. This non-monetary contribution represents the occasional

use of the Institute's facilities and office equipment for the benefit of the Committee.

33. The Committee maintains a website. The website address is www.defeatc.com. On its website, the Committee has links to the websites of other groups and organizations opposing Referenda C and D. The Committee also has links to the Institute's website and the three radio ads paid for by the Institute.

34. The Committee did not compensate the Institute for the use of the radio ads nor did the Institute charge the Committee for its use of them. There is no evidence that the institute donated or gifted the ads to the Committee for its use or created the ads for the Committee's benefit. The ads are publicly available.

## DISCUSSION

### I. Is the Institute an issue committee, as defined in Article XXVIII, § 2(10)(a).

Complainant alleges that the Institute has become an "issue committee" as defined in the Colorado Constitution. Article XXVIII, § 2(10)(a) defines issue committee as:

> [A]ny person, other than a natural person, or any group of two or more persons, including natural persons:

> (I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or
>
> (II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

The Colorado Secretary of State has enacted Rule 1.6(b), 8 CCR 1505-6, which specifies that both conditions listed in subparagraphs (I) and (II) above must be met in order for an entity to be an "issue committee".

> A person or group of persons is an issue committee only if it meets *both* of the conditions in Article XXVIII, Section 2(10)(a)(I) *and* 2(10)(a)(II).

8 CCR 1505-6, § 1.6 (emphasis in original).

The Secretary's Rule 1.6(b) was extended by Senate Bill 05-183 and is presently in effect. *See* Continuation of 2004 Rules of Executive Agencies, S.B. 05-183 § 1(p), 65th Gen. Assem., Reg. Sess. (Colo. 2005). A rule of the Secretary of State must be construed as presumptively valid. *Colo. Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (Colo. 1996). And since the Secretary is the government official responsible for the administration of campaign finance laws, her construction is entitled to great weight. *Mile High Greyhound Park, Inc. v. Colo. Racing Comm'n*, 12 P.3d 351 (Colo.App. 2000) *See also, Davis v. Conour*, 178 Colo. 376, 497 P.2d 1015

(1972) (in interpreting a statute one should look to the contemporaneous construction of the act by the public officials charged with its administration.) Additionally, Colorado law permits "or" to be construed as "and" when necessary to implement the plain meaning or intent of a law. *Armintrout v. People*, 864 P.2d 576, 581 (Colo. 1993); *Thomas v. City of Grand Junction*, 56 P. 665 (1899).

Counsel for the Institute, in his closing brief, quotes from a memorandum prepared by William A. Hobbs, Deputy Secretary of State, for the Committee on Legal Services 5, dated December 14, 2004, supporting the Secretary's construction of Rule 1.6(b). In his December 14 memo, Mr. Hobbs states that the Secretary adopted Rule 1.6(b) to avoid the absurd result and the unconstitutional infringement on constitutional rights of association and free expression if a disjunctive reading of subsections (I) and (II) is required. This memorandum was not submitted at the hearing and is not part of the evidentiary record in this case. However, for the purpose of determining the intent of the law and harmonizing the Secretary's rules with Article XXVIII, the ALJ finds the argument persuasive and adopts the Secretary's construction. *See,* Ragsdale *Bros. Roofing v. United Bank*, 744 P.2d 750 (Colo.App. 1987) (statutes should be interpreted, if possible, to harmonize and give meaning to other potentially conflicting laws.)

*Defining an Issue Committee*

At least three of the elements in the definition of an "issue committee" are not in dispute in this case. First, the Institute, as a non-profit corporation, satisfies the definition of "person" in Colo. Const. art. XXVIII, § 2(11). Second, the Institute spent more than $200 on the radio ads at issue in this case. And third, Referenda C and D are ballot issues or ballot questions. Therefore, the remaining issues that must be resolved by the ALJ are: (1) does the Institute have a "major purpose" of supporting or opposing Referenda C and D; and, if so, (2) are the Institute's actions to "support or oppose" Referenda C and D.

*Does the Institute have a major purpose of supporting or opposing Referenda C and D?*

Article XXVIII of the Colorado Constitution does not define the term "major purpose" and the United States Supreme Court's cases concerning campaign finance laws are not instructive when determining this phrase. The Supreme Court cases interpret the phrase "the major purpose" in the context of the defining "political committees." *See Buckely v. Valeo*, 424 U.S. 1 (1976) and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986). In this case, the ALJ must interpret the phrase "major purpose" in the context of an "issue committee."

In order to determine the meaning of "major purpose," the court must look to ascertain and give

effect to the intent of the voters and interpret the words in light of their plain meaning. *Coffman v. Colorado Common Cause*, 102 P.2d 999, 107 (Colo. 2004); *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)). Furthermore, it is a well-established principle in the area of statutory construction that words and phrases are to be construed according to their familiar and generally accepted meaning, *Allstate Ins. Co., v. Smith*, 902 P.2d 1386 (Colo. 1995), while reaching a just and reasonable result. *See*, § 2-4-201(1)(b), C.R.S. (2005).

A plain reading of the definition of an issue committee in Article XXVIII, § 2(10)(a)(I) reveals that the "major purpose" provision does not require that the only purpose or even the primary purpose of an entity be to support or oppose a ballot question. Rather, the definition requires only a determination that the entity has "a" major purpose of supporting or opposing a ballot measure. As such, the use of the word "a" does not restrict the number of major purposes an entity may have. Any analysis to determine a major purpose of the Institute must begin with a discussion about the history of the organization and its founding mission.

The institute was founded in 1985 as a non-partisan, non-profit public policy research organization. Its mission is to provide policy makers, legislators, and the citizens of Colorado with educational and analytical materials on a broad spectrum of issues from a free-market perspective. It does this by producing and publishing educational materials from

each of its six core policy centers. In the last several years, the Institute has published over twenty issue papers dealing with topics such as public school reform, improving transportation, balancing Colorado's budget, improving the state's prison system, promoting privatization of government functions, and implementing taxing and spending limits. Only one of the Institute's six policy centers (the Fiscal Policy Center) focuses on taxation issues.

The Fiscal Policy Center has been in existence for many years. Since 1992, its focus has included issues related to TABOR. During the past five months, Referenda C and D have taken on significance for this center. However, arguably, even within the Fiscal Policy Center, C and D have not been the major focus; they are only of recent importance. The institute, through this policy center, has been involved in taxation issues long before the enactment of TABOR and the referral of Referenda C and D. And, all reasonable inferences suggest that the Institute's Fiscal Policy Center will remain involved in matters of general taxation and TABOR long after the fate of C and D are determined. There is no evidence that after the election, the mission or purpose of the Fiscal Policy Center or the Institute will be fundamentally altered or that it will cease to exist, as might be expected if its major purpose were linked to the outcome of an election. The fact that Referenda C and D are issues that align with one of the Institute's policy centers does not make Referenda C and D a major purpose of the Institute. This is further supported by

the fact that, during the past five months, Mr. Caldara, as President of the institute, has spent two-thirds of his time on issues not related to C and D. And, during the past several months, the Institute's remaining senior staff members have continued to work on issues not related to C and D.

In the spring of 2005, the Institute paid directly for and received in-kind contributions for three radio ads costing a total amount of $235,000. Complainant argues that the sheer amount of money spent by the Institute indicates what its "major" purposes are. In support of this argument, Complainant cites to a recent federal court decision dealing with Colorado's regulation of political committees. *Colorado Right to Life Committee, Inc. v. Davidson*, Civ. Action No. 03-CV-145 (slip op.).[2]

In *Colorado Right to Life Committee*, Judge Walker Miller struck down the application of the political committee definition to a 501(c)(3) organization because no "major purpose" test could be applied to that definition. The definition of "political committee" renders a person or entity a political committee if he or it contributes or expends more than $200 to support or oppose a candidate. *See* Colo. Const. art XXVIII, § 2(12)(a). In his opinion, Judge Miller found that the $200 threshold in the definition of a political

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[2] *Colorado Right* to *Life* Committee decision was admitted as exhibit R-15 in this case.

committee was incompatible with a major purpose test.

> Consequently, an entity that spends $200,000 on various non-political activities and donates $200 (1/10 of 1% of its budget) to a candidate is deemed a political committee. Furthermore, the amount of money an organization must accept or spend – $200 – is not substantial and would, as a matter of common sense, operate to encompass a variety of entities based on expenditure that is substantial in relation to their overall budgets.

*Id.* at 30.

In this case, Complainant argues that the amount spent by the Institute on the three radio ads is substantial (1/16 of this year's budget – $235,000/ $1.4 million) and reflects how important C and D's defeat is to the Institute. "Using Judge Miller's quantitative analysis as the touchstone, the purpose associated with this activity must be considered to be 'major'." (Complainant's Closing Brief, page 8). For the following reasons, the ALJ does not find this argument persuasive.

The issues raised in the *Colorado Right to Life Committee* case concern the definition of a political committee, not an issue committee. The Court, in *Colorado Right to Life Committee*, looked to the $200 trigger as a way of determining whether it could

construe § 2(12) as including a major purpose test.[3] In this case, the relevant section of Article XXVIII is § 2(10), which expressly incorporates a major purpose test; therefore, the analysis undertaken by Judge Miller, while thoughtful, does not have direct application to this case. The amount of money spent by the Institute for radio ads is only one of many factors to be considered when ascertaining a major purpose.

In his closing brief, Complainant suggests that little weight should be given to Mr. Caldara's description of the institute's activities in determining the Institute's major purpose because, "[t]o rely on such representations from the party subject to regulation would permit conduct that is intended to be covered 'to escape regulation merely because the stated purposes were misleading, ambiguous, fraudulent, or all three'" (Complainant's Closing Brief, page 7, citing *League of Women Voters v. Davidson*, 23 P.3d 1266, 1275 (Colo.App. 2001)). Yet, Complainant introduced no evidence refuting Mr. Caldara's testimony regarding the primary mission of the Institute, the objectives of the Institute or the various activities it has been involved in over the past twenty-one years. The ALJ finds no reason to discount the testimony of Mr. Caldara, particularly as to the Institute's activities as those activities are well supported by the documents introduced at hearing.

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[3] This argument was raised by the Secretary of State to provide justification for the state's regulation of political committees. *Colorado Right to Life Committee*, page 29.

The Institute was established twenty-one years ago with the purpose of promoting free-market based ideas in several areas, only one of which includes taxation and spending. The Institute's purposes of opposing taxation and government spending long predate Referenda C and D.

In determining the issues raised in Complainant's complaint, it is the role of the ALJ to weigh the evidence and from the evidence reach conclusions. The "weight of the evidence" is the relative value assigned to the credible evidence offered by a party to support a particular position. The weight of the evidence is not quantifiable in an absolute sense and is not a question of mathematics, but rather depends on its effect in inducing a belief. The standard of proof that applies in this administrative proceeding is "by a preponderance." This standard has been explained as follows:

> The preponderance standard requires that the prevailing factual conclusions must be based on the weight of the evidence. If the test could be quantified, the test would say that a factual conclusion must be supported by 51% of the evidence. A softer definition, however, seems more accurate.; the preponderance test means that the fact finder must be convinced that the factual conclusion it chooses is more likely than not.

Koch, *Administrative Law and Practice*, Vol. 1 at 491 (1985).

In the instant case, the facts do not support the argument that opposition to Referenda C and D was a major purpose of the Institute. Having considered the length of time the Institute has been in existence, the purpose for which is was established, the various issues it has been involved with, and its multifaceted organizational structure (i.e. the six policy centers), the ALJ concludes that Complainant has failed to establish, by a preponderance of the evidence, that the Institute had a "major purpose" of opposing Referenda C and D.

*Common Sense Alliance v. Davidson*

Even if the ALJ were to find that the Institute had a major purpose of opposing C and D, consistent with the Colorado Supreme Court's holding in *Common Sense Alliance*, 995 P.2d 748, 753 (Colo. 2000), the ALJ would not so broadly construe the definition of issue committee to include the Institute. In *Common Sense Alliance*, the Court was required to determine whether an organization formed for other purposes may later become an issue committee as defined by the FCPA. At that time, the FCPA defined "issue committee" as two or more persons who have associated themselves for the purpose of supporting or opposing a ballot initiative. Although the definition of issue committee that currently appears in Article XXVIII, § 2(10)(a) has changed from the former section in the FCPA, the policy and constitutional concerns raised by the Court have not.

First, in *Common Sense Alliance*, the Court concluded that the statute was insufficiently clear to include CS Alliance within the reach of the issue committee definition. In doing so, the Court held that: the statute contained no guidance as to when a committee formed for another purpose would be deemed to become an issue committee; when its contributors would become subject to the disclosure requirements; or even which of its contributors would need to be disclosed. *Id.* at 749.

> Were we to interpret the statute broadly, any political or special interest organization could become an issue committee through a decision of its leadership to support or oppose a ballot initiative without the assent or perhaps even the knowledge of its members. Such a decision would then trigger the reporting and financial contributions of the members of the organization. Because constitutional rights concerning freedom of association and freedom of speech are implicated, we decline to give the statute that broad reading and decline to provide judicial answers to the questions left unanswered in the statute.

*Id.*

Second, in applying a narrow interpretation to the definition of an issue committee, the Court looked to the larger purpose behind the campaign laws and in so doing held:

> As currently written, the FCPA assures disclosure of information regarding large contributions to candidate campaigns. The purposes served by disclosure of that information do not propel a conclusion that CS Alliance should also be subject to the same disclosure provisions. The identity of supporters and opponents of a ballot initiative would be potentially helpful to the electorate, but the information is not nearly as critical as the identity of candidate supporters. As the Supreme Court has stated: "The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 790 (1978) . . . This is because "ballot initiatives do not involve the risk of 'quid pro quo' corruption present when money is paid to, or for, candidates." *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 203 (1999).

*Common Sense Alliance*, at 755.

Finally, with respect to the requirement that CS Alliance would have to disclose the identity of its members if it were found to be an issue committee, the Court held:

> [T]itle members of CS Alliance should have advance notice of the consequences of their political activities and be able to anticipate the extent to which their political associations and activities will become a matter of public knowledge. If we construe the FCPA to

> permit CS Alliance to evolve into an issue committee, the supporters of the CS Alliance will not have had the benefit of choosing whether they wish to contribute to an organization required to make public disclosures . . . [T]he right of the electorate to be informed on how public issue campaigns are financed, and by whom, must be balanced against the rights of free association and free speech of an organization's members.

*Id.* at 756, 757.

The parallels between the instant case and *Common Sense Alliance* are striking. If the Institute were deemed to be an issue committee, its members would not have advance notice that their political associations and activities will become matters of public knowledge. Further, the definition of an issue committee in Article XXVIII contains no guidance as to when a committee formed for another purpose would be deemed to become an issue committee; when its contributors would become subject to the disclosure requirements; or even which of its contributors would need to be disclosed. For these reasons, the ALJ adopts, in its entirety, the Court's analysis in *Common Sense Alliance* and declines to expand the definition of issue committee to include the Institute, even if it had a major purpose of opposing Referenda C and D.

*Secretary of State's Rules*

The position that a non-profit membership organization, with a major purpose other than the support or opposition of a ballot issue, or one with multiple major purposes, should not be deemed an issue committee is further supported by the definition of an issue committee and the Secretary's rules. Pursuant to § 2(10)(c), Article XXVIII, "[a]n issue committee shall be considered open and active until affirmatively closed by such committee or by action of the appropriate authority." The Secretary's rules permit the closing of an issue committee only after it is completely de-funded and when it no longer intends to receive contributions or make expenditures. *See*, Rule 3.4, 8 CCR 1505-6.

If a non-profit organization, formed for a purpose other than supporting or opposing a ballot issue or one with multiple purposes, evolved into an issue committee, under the Secretary's rules, it would. be forced to dispose of its assets, pay any outstanding debt and eliminate its members. Such broad interpretation of the definition of an issue committee culminates in an absurd result, and one that cannot have been intended. In fact, if the actions of the Institute are found to be within the definition of an issue committee, the same standard could be applied to a myriad of other similarly situated groups, ranging from the Children's Campaign, to Bell Policy institute, to the Red Cross, simply by undertaking efforts to support or oppose ballot issues or questions.

*Did the Institute accept or make contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question?*

In light of the ALJ's conclusions, that the Institute does not have a major purpose of opposing Referenda C and D and that, under *Common Sense Alliance*, the definition of issue committee cannot be expanded to include the Institute even if it has a major purpose of opposing these ballot measures, the ALJ does not need to address whether the Institute accepted or made contributions or expenditures in excess of $200 to support or oppose a ballot issue or ballot question.

## II. Did Vote No fail to report the contributions it received from the Institute?

In his First Amended Complaint, Complainant asserts that Vote No violated § 1-45-108(1), C.R.S. by failing to disclose its receipt of the Institute's below-market value of its contributions of goods, services, and participation at campaign events. (First Amended Complaint, page 3, ¶ 16). It his closing brief, Complainant narrows his argument and more specifically alleges that the three radio ads became non-monetary contributions to the Committee by the Institute that were never disclosed. Complainant contends that these ads were a gift of property (i.e., the amount of money that would have been required to be spent by Vote No to produce and air these ads) made to Vote No. Accordingly, Complainant asserts that Vote No violated the FCPA by failing to disclose the

Institute as the non-monetary contributor of $35,000 worth of radio ads and the name of the in-kind non-profit agency as the non-monetary contributor of the $200,000 worth of radio ads.

Article XXVIII, § 2(5)(a) defines "contribution" as:

> (I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any . . . issue committee . . . ;
>
> (II) Any payment made to a third party for the benefit of any . . . issue committee . . . ;
>
> (III) The fair market value of any gift or loan of property made to any . . . issue committee . . . ;

The three radio ads in question were posted on the Institute's website and made available to other groups, including Vote No. Vote No included a link to these ads on its website, along with links to the websites of other groups and organizations opposing Referenda C and D. In order to determine if the three ads constitute a contribution to Vote No, the ALJ must determine the following three questions: When the Institute paid for the first ad was it done for the benefit of Vote No? Did the unnamed non-profit agency, on behalf of the Institute, pay for the second and third ads for the benefit of Vote No? Were the ads a gift from the institute to the Committee?

There is no credible evidence in the record supporting Complainant's argument that the Institute and/or the unnamed non-profit agency produced or

paid for the radio ads for the benefit of Vote No. All three ads were produced and aired by the Institute. The Institute produced, paid for (directly or through in-kind contributions), and aired these ads as part of its educational efforts to inform Colorado voters about the dangers of Referenda C and D. The Institute made the radio ads for the benefit of its members, not the Committee. The fact that the Institute's ads are publicly available on its website does not change this fact.

The Institute posts much of its material on its website. It does not charge anyone or receive compensation from any persons, agencies, or groups who download information or create links to its website. Vote No created links on its website to the Institute, which include links to the radio ads. Complainant contends that this activity renders the ads a gift and therefore a reportable contribution. The ALJ disagrees.

There is no evidence that the institute donated or gifted its ads to the Committee or to any other group for that matter. The Institute's website is available for others to access. Under common law, it is well established that in order to constitute a gift there must be evidence of a volitional act and donative intent. *Bunnell v. Iverson*, 147 Colo. 552, 364 P.2d 385 (Colo. 1961). (It is fundamental that in order to constitute a valid gift, there must be: First, a clear and unequivocal intent on the part of the donor to make a gift and, Secondly, delivery of the subject matter or other action on the part of the donor and donee which

effectively divests the former and invests the latter with title or property.) This common law definition comports with the definition of a "contribution" in Article XXXV 111. The definition of a "contribution" in Article XXVIII includes the specific phrase, "**made to**," whether in the context of a gift, loan, pledge, payment, advance of money, or guarantee of a loan. *See*, Article XXVIII, § 2(5)(a)(I) and (III). The phrase "made to" clearly contemplates the notion of a volitional act or donative intent on the part of the gifting or contributing party.

The mere fact that others, including the Committee, can access the institute's website and create links to its radio ads does not make the ads a gift or the Institute a contributor for reporting purposes under the FCPA. To conclude any other way would create an absurd result, in that, a party could be forced to report a contribution when the "contributing" party had no intention of making a contribution and may not have even known they did. In order for there to be a reportable event under the FCPA, there must be some evidence that the Institute's ads were gifts to the Committee and there is no such record of that in this case.

## CONCLUSIONS OF LAW

1. Pursuant to Colo. Const, art. XXVIII, § 9(2)(a), the ALJ has jurisdiction to conduct a hearing in this matter and to impose appropriate sanctions.

2. The issues in a hearing conducted by an ALJ under Article XXVIII of the Colorado Constitution are limited to whether any person has violated Sections 3 through 7 or 9(1)(e) of Article XXVIII, or Sections 1-45-108, 114, 115, or 117, C.R.S., Colo. Const. art. XXVIII, § 9(2)(a). If an ALJ determines that a violation of one of these provisions has occurred, the Allis decision must include the appropriate order, sanction or relief authorized by Article/III. Colo. Const. art. XXVIII, § 9(2)(a).

3. Colo. Const. art. XXVIII, § 9(1)(f) provides that the hearing is conducted in accordance with the Colorado Administrative Procedure Act (APA)[4]. Under the APA, the proponent of an order has the burden of proof. Section 24-4-105(7), C.R.S. In this instance, Complainant is the proponent of an order seeking civil penalties against Respondents for violations of the FCPA. Accordingly, Complainant has the burden of proof. The applicable standard of proof in this case is by a preponderance of the evidence.

4. Complainant has failed to establish, by a preponderance of the evidence, that the institute is an issue committee as defined in § 2(10)(a), Article XXVIII of the Colorado Constitution. Accordingly, the Institute did not violate the law by failing to register as an issue committee, by failing to file disclosure reports of contributions and expenditures, or by failing

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[4] Section 24-4-101, *et seq.*, C.R.S.

to set up a separate account for its activities related to Referenda C and D.

5. Complainant has failed. to establish, by a preponderance of the evidence, that Vote No violated the FCPA by failing to disclose contributions it received from the Institute.

## AGENCY DECISION

It is the Agency Decision of the Administrative Law Judge that neither the Institute nor Vote No violated the FCPA or Article XXVIII of the Colorado Constitution in any respect alleged in Complainant's First Amended Complaint. The complaint is dismissed. Each party is responsible for paying their own costs and attorneys' fees associated with the filing of this complaint.

This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

**DONE AND SIGNED**
November 4, 2005

/s/ Michelle A. Norcross
MICHELLE A. NORCROSS
Administrative Law Judge

DISTRICT COURT, CITY AND
COUNTY OF DENVER, COLORADO
1437 Bannock Street
Denver, CO 80202

**Plaintiff:**

INDEPENDENCE INSTITUTE,
a Colorado non-profit corporation

v.

Case Number:
05CV7604

Ctrm: 7

**Defendants:**

RICHARD EVANS and GIGI
DENNIS, in her capacity as
SECRETARY OF STATE,
STATE OF COLORADO

## ORDER DENYING MOTION FOR PRELIMINARY INJUNCTION

(Filed Oct. 12, 2005)

THIS MATTER is before the Court on a Motion for Preliminary Injunction filed on behalf of the Independence Institute, seeking to enjoin an administrative hearing scheduled to commence on October 11, 2005 at 8:00 a.m. The hearing is premised upon a complaint filed by Defendant Richard Evans and forwarded to the Division of Administrative Courts by Colorado's Secretary of State in accordance with Article XXVIII, § 9(2)(a) of Colorado's Constitution. The complaint (as best as can be discerned from the pleadings), alleges that Independence Institute is an "issue committee" within the meaning of Article XXVIII, § 2(10) in connection with a certain ballot

issue that is subject to voter consideration in November and, as such, failed to comply with the disclosure requirements of Article XXVIII, § 7 and C.R.S. § 1-45-108. With respect to the motion for preliminary injunction, the Court has considered the motion and the responses filed by both defendants, the arguments of counsel presented during the hearing on October 10, 2005, as well as the authorities cited by the parties in their pleadings and arguments. Being sufficiently advised in the premises, the Court finds and orders as follows.

1. **Exhaustion of Remedies**

As a threshold matter, Defendants assert that the Court lacks jurisdiction to stay the administrative proceedings because Plaintiff has failed to exhaust its administrative remedies. Specifically, Defendants assert that the district court may enjoin an on-going administrative proceeding only upon a showing of (1) irreparable injury and (2) that the agency proceeding or the action proposed to be taken is clearly beyond the constitutional or statutory jurisdiction or authority of the agency. C.R.S. § 24-4-106(8); *see Envirotest Systems, Corp. v. Colorado Department of Revenue*, 109 P.3d 142 (Colo. 2005) (generally, under the APA and exhaustion of remedies principles, courts will not review or grant relief in regard to any aspect of administrative proceedings until the agency has taken final action; subject to the exception of section 24-4-106(8)).

In *City and County of Denver v. United Air Lines*, 8 P.3d 1206 (Colo. 2000), the Colorado Supreme Court discussed the jurisdictional requirement that a plaintiff exhaust available administrative remedies before bringing suit to challenge administrative action. There, the Court recognized that the exhaustion doctrine promotes important and related policy interests, including allowing agencies with expertise in a particular subject matter to develop the necessary factual record upon which the agency and subsequent reviewing courts may base their decisions; promoting efficiency in the administrative context by preventing the interruption and fragmentation of the administrative process; allowing the agency the opportunity to correct its own errors in the first instance and thereby preserve the autonomy of the agency; and conserving judicial resources by insuring that courts intervene only if the administrative process fails to provide adequate remedies. 8 P.3d at 1212-1213.

However, the Court recognized limited exceptions to the exhaustion requirement in situations in which the policies underling [sic] the doctrine would not be served, including, *inter alia*, instances when the matters in controversy are such that the agency lacks the authority or capacity to determine, such as constitutional issues. 8 P.3d at 1213. In this context, the Court stated, "a party challenging the constitutionality of an agency's governing statute or ordinance, for example, does not have to exhaust administrative remedies because the agency lacks the necessary expertise to address the constitutionality of statutes

and other issues of law that fall squarely in the province of the courts." *Id.* In concluding that United failed to demonstrate that any exceptions to the exhaustion doctrine excused its failure to pursue the specific administrative procedures outlined by Denver its Municipal Code, the Court noted that United likewise did not pursue any constitutional or purely legal challenges that would have been beyond the scope of the proceedings available at the administrative level. The Court contrasted United's failure in this regard to the situation in which a plaintiff was exempt from the exhaustion requirement because it "sought review of the constitutionality of the Code and not review of the agency's decision." *See Fred Schmid Appliance & Television Co. v. City and County of Denver*, 811 P.2d 31 (Colo. 1991).

Plaintiff's complaint in the instant case asserts that the definition of "issue committee" as set forth in Article XXVIII, § 2(10) is unconstitutionally vague and overbroad, and is violative of Plaintiff's First Amendment rights of Association and Free Expression. Plaintiff thereby seeks review not of the agency's final decision, but rather of the constitutionality of the law that the agency must apply in reaching its final decision.[1] Moreover, it is undisputed that the facial

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[1] In this respect, the case at bar is distinguishable from *Envirotest, supra*, wherein the complaint for injunctive relief was premised upon the hearing officer's procedural decisions in the midst administrative proceedings, including the decision not to issue certain subpoenas.

constitutional challenges asserted by Plaintiff to Article XXVIII is beyond the agency's constitutional jurisdiction. *See* Colo. Constit. Article XXVIII, § 9(2)(a). As such, Plaintiff's claims implicate none of the policies underlying the exhaustion doctrine; to the contrary, such claims fall squarely within the exception to the exhaustion requirement recognized by the supreme court in *United* and applied in *Fred Schmid*. The Court therefore concludes that the exhaustion doctrine is inapplicable in the instant case, and the Court has jurisdiction to consider the merits of Plaintiff's motion for preliminary injunction.

**2. Preliminary Injunction**

Preliminary injunctive relief is an extraordinary remedy designed to protect a plaintiff from sustaining irreparable injury and to preserve the power of the district court to render a meaningful decision following a trial on the merits. *Rathke v. MacFarland*, 648 P.2d 648 (Colo. 1960). The grant or denial of a preliminary injunction is a decision which lies within the sound discretion of the trial court. However, injunctive relief should not be indiscriminately granted. "Rather, it should be exercised sparingly and cautiously and with a full conviction on the part of the trial court of its urgent necessity." *Id.*, 648 P.2d at 653. In exercising its discretion, a court must find that the moving party has demonstrated (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that

there is no plain, speedy and adequate remedy at law; (4) that the granting of a preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) that the injunction will preserve the status quo pending a trial on the merits. *Id.*, 648 P.2d at 653-654. The burden is upon the moving party to establish each of the six criteria; "if each criterion cannot be met, injunctive relief is not available." *Id.*

**a. Likelihood of success**

Based upon the pleadings and applicable authorities, the Court initially finds that Plaintiff has demonstrated a reasonable probability of success on the merits as to at least one, if not all, of its claims. An "issue committee," as defined by Article XXVIII, § 2(10), "means any person, other than a natural person or any group of two or more persons, including natural persons (I) that has a major purpose of supporting or opposing any ballot issue or ballot question or (II) that has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question."[2] Plaintiff asserts that "because the definition fails to provide any temporal or substantive limitations on either contributions or major purpose, the definition

[2] The definition has been narrowed by Secretary of State Rule 1.6 b and Senate Bill 05-183 to apply only to situations in which the person or group of persons meets both of the conditions of Article XXVIII, § 2(10)(a)(I) and (II).

is unconstitutionally vague." Motion for Preliminary Injunction at 7. Defendants correctly argue that the phrase "major purpose" had been adopted by the Supreme Court to save the definition of "political committee" from claims that it is unconstitutional. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976). Defendants also argue persuasively that the terms "major" and "purpose" are susceptible to commonly understood meanings. However, the potential constitutional infirmities of section 2(10) extend beyond the incorporation of the "major purpose" limitation within the definition or the plain or common meaning of that particular phrase.

In *Common Sense Alliance v. Davidson*, 995 P.2d 748 (Colo. 2000), the Colorado Supreme Court examined a version of the Fair Campaign Practices Act (FCPA) that preceded the enactment of Article XXVIII in the context of answering certain questions certified by the United States District for the District of Colorado. The statute in issue defined "issue committee" as "two or more persons who are elected, appointed, or chosen, or have associated themselves, *for the purpose of* accepting contributions and making expenditures to support or oppose any ballot issue or ballot question." 995 P.2d at 752. The certified questions before the Court included (1) whether an organization formed for other purposes may later become an issue committee as defined by the FCPA; (2) if an organization can evolve into an issue committee, at what point in time does the group become subject to the statute's requirements; and (3) which

contributions must be disclosed. In resolving the questions, the supreme court construed the statutory language narrowly, holding that the plain language of the statute as well as its legislative history demonstrated that the FCPA covered only those issue committees that were created and intended for the purpose of supporting or opposing a ballot issue; organizations that were formed for another purpose and later become involved in ballot issue activity did not fall within the ambit of the statute. 995 P.2d at 753 – 755.

Significantly, the Court was "constrained in any broad or inclusive reading of the statute by the constitutional concerns raised in the United States District Court proceeding." 995 P.2d at 755. Without ruling on the constitutional issues, the supreme court stated:

> The First Amendment demands specificity so individuals may assess the burden on their rights to free speech and free association, and make an informed decision . . . Therefore, the members of CS Alliance should have advance notice of the consequences of their political activities and be able to anticipate the extent to which their political associations and activities will become a mater [sic] of public knowledge. If we construe the FCPA to permit CS Alliance to evolve into an issue committee, the supporters of CS Alliance will not have had the benefit of choosing whether they wish to contribute to an organization required to make public disclosures. Ballot

> propositions are often among the most divisive and controversial public issues. Therefore, 'it is quite probable that one who advocates an unpopular position would be most reluctant to exercise his right of free speech if his name [and] address . . . will become a matter of public record.' [Internal citation omitted.] . . . Certainly an individual should have a choice in determining whether to engage in a process that results in public disclosure of affiliation.

995 P.2d at 756. The Court went on to further elucidate a number of additional practical and constitutional issues that could potentially arise should the statute be broadly interpreted to permit an organization to become an "issue committee" at some time after its initial formation. *See* 995 P.2d at 757.

However, unlike the statutory language at issue in *Common Sense Alliance*, defining "issue committee" narrowly as being formed *for the purpose of* supporting or opposing a ballot issue or question, the definition of section 2(10) is expansive, including a person or group *that has a major purpose of* supporting or opposing a ballot issue or question. As defined, the provision includes within its sweep those group specifically formed to support or oppose ballot issues as well as groups that are formed for other purposes but which, at some time, chooses to support or oppose a ballot issue. Thus, absent some temporal or other limiting language, an organization formed for another purpose may, under the plain terms of section 2(10), later "evolve" into an "issue committee"

based upon decisions of some but not all of its members, *see* 995 P.2d at 757, thereby raising the potential constitutional issues addressed but not implicated by the supreme court in *Common Sense Alliance*. Accordingly, and without reaching any ultimate conclusions as to the merits of Plaintiff's claims, the Court concludes that Plaintiff has established a reasonable likelihood of success as to its constitutional claims sufficient to satisfy the first criteria required under *Rathke*.

**b. Irreparable injury/Adequate legal remedy**

The prospect of Plaintiff being determined to be an "issue committee" subject to the disclosure requirements of Article XXVIII, without the opportunity to assert its constitutional defenses, initially suggests a potential for real and irreparable injury that could, in fact, be prevented by injunctive relief. However, in light of the factual and legal posture of this case, the issue of irreparable injury cannot be fully evaluated without also considering the adequacy of Plaintiff's remedies at law. As Defendants correctly assert, while an administrative agency may not decide a challenge to the facial constitutionality of Article XXVIII, it may address whether the provision has been unconstitutionally applied. *See Kantara, Inc. v. State*, 991 P.2d 332 (Colo. App. 1999). Moreover, the administrative law judge has the discretion to fashion protective orders to protect Plaintiff from disclosure during the administrative process, as well as the discretion to stay enforcement

of any order requiring disclosure pending any appeal of any adverse order.[3]

More significant, however, is the express authorization under Article XXVIII for review by the court of appeals of any final order ultimately issued by the administrative agency. § 9(2)(a). Pursuant to that authority, the court of appeals is empowered to, *inter alia*, "hold unlawful and set aside the agency action and . . . restrain the enforcement of the order or rule under review," should it find that the agency action constitutes "a denial of statutory right [or is] contrary to constitutional right, power, privilege, or immunity. . . ." C.R.S. § 24-4-106(7); § 24-4-106(11). Thus, Plaintiff's constitutional right of judicial review of any adverse order, in conjunction with the discretionary authority of both the administrative agency and the court of appeals to stay enforcement of any adverse order pending judicial review, provides Plaintiff with an adequate remedy at law not only to protect it from premature disclosure but also to review the merits of any underlying adverse decision. *See, e.g., Jeffrey v. Colorado State Department of Social Services*, 599 P.2d 874 (Colo. 1979).

The adequacy of the remedies at law also belie any real, immediate or irreparable injury. Plaintiff's

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[3] Defendants represented at the hearing, without contradiction, that the hearing officer encouraged the parties to fashion appropriate protective orders and, absent a stipulation, was inclined to fashion protective orders on its own accord.

constitutional right to appeal, with the agency's and court's concomitant discretion for stay, undermine any finding of "immediate" injury. Moreover, should the court, on appeal, conclude that adverse agency action was contrary to constitutional rights, enforcement of such agency action may be restrained; should the agency action be affirmed, disclosure may be compelled. In neither event, has Plaintiff sustained "irreparable" injury.

### c. Other *Rathke* criteria

In light of the Court's conclusion that Plaintiff has failed to satisfy at least two of the six criterion necessary for the issuance of a preliminary injunction, the Court does not address whether the granting of a preliminary injunction would disserve the public interest, whether the balance of equities favors the injunction, or whether the injunction would preserve the status quo pending a trial on the merits. *Rathke*, 648 P.2d at 654.

## 3. Conclusion

In light of the foregoing, it is therefore ordered that Plaintiff's Motion for Preliminary Injunction is denied.

**SO ORDERED** this 11th day of October, 2005.

**BY THE COURT:**

/s/ Martin Egelhoff
**Martin Egelhoff**
**District Court Judge**

Colorado Supreme Court
2 East 14th Ave., Fourth Floor
Denver, CO 80203

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Certiorari to the Court of Appeals, 2007CA1151

District Court, City and County of Denver, 2005CV7604

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**Petitioner:**

Independence Institute, a Colorado non-profit corporation,

v.

**Respondent:**

Bernie Buescher, in his official capacity as Secretary of State, State of Colorado.

Supreme Court Case No: 2009SC26

## ORDER OF COURT

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

CHIEF JUSTICE MULLARKEY AND JUSTICE EID WOULD GRANT as to the following issues:

> Whether the court of appeals erred when it held that the definition of "issue committee" in Article XXVIII of the Colorado

Constitution is not unconstitutionally vague or overbroad.

Whether the court of appeals erred when it concluded that Colorado's disclosure requirements for donors to issue committees do not violate the right to engage in anonymous speech and association.

BY THE COURT, EN BANC, JUNE 1, 2009.

[SEAL]

## U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

## COLO. CONST. ART. XXVIII

## COLO. CONST. ART. XXVIII, SECTION 1

Section 1. Purpose and findings

The people of the state of Colorado hereby find and declare that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption; that large campaign contributions made to influence election outcomes allow wealthy individuals, corporations, and special interest groups to exercise a disproportionate level of influence over the political process; that the rising costs of campaigning for political office prevent qualified citizens from running for political office; that because of the use of early voting in Colorado timely notice of independent expenditures is essential for informing the electorate; that in recent years the advent of significant spending on electioneering communications, as defined herein, has frustrated the purpose of existing campaign finance requirements; that independent research has demonstrated that the vast majority of televised electioneering communications goes beyond issue discussion to express electoral advocacy; that political contributions from corporate treasuries are not an indication of popular support for the corporation's political ideas and can unfairly influence the outcome of Colorado elections; and that the interests of the public are best served by limiting campaign contributions, encouraging voluntary campaign spending limits, providing for full and timely disclosure of campaign contributions,

independent expenditures, and funding of electioneering communications, and strong enforcement of campaign finance requirements.

## COLO. CONST. ART. XXVIII, SECTION 2

Section 2. Definitions

For the purpose of this article and any statutory provisions pertaining to campaign finance, including provisions pertaining to disclosure:

(1) "Appropriate officer" means the individual with whom a candidate, candidate committee, political committee, small donor committee, or issue committee must file pursuant to *section 1-45-109(1), C.R.S.*, or any successor section.

(2) "Candidate" means any person who seeks nomination or election to any state or local public office that is to be voted on in this state at any primary election, general election, school district election, special district election, or municipal election. "Candidate" also includes a judge or justice of any court of record who seeks to be retained in office pursuant to the provisions of section 25 of article VI. A person is a candidate for election if the person has publicly announced an intention to seek election to public office or retention of a judicial office and thereafter has received a contribution or made an expenditure in support of the candidacy. A person remains a candidate for purposes of this article so long as the candidate maintains a registered

candidate committee. A person who maintains a candidate committee after an election cycle, but who has not publicly announced an intention to seek election to public office in the next or any subsequent election cycle, is a candidate for purposes of this article.

(3) "Candidate committee" means a person, including the candidate, or persons with the common purpose of receiving contributions or making expenditures under the authority of a candidate. A contribution to a candidate shall be deemed a contribution to the candidate's candidate committee. A candidate shall have only one candidate committee. A candidate committee shall be considered open and active until affirmatively closed by the candidate or by action of the secretary of state.

(4) "Conduit" means a person who transmits contributions from more than one person, directly to a candidate committee. "Conduit" does not include the contributor's immediate family members, the candidate or campaign treasurer of the candidate committee receiving the contribution, a volunteer fund raiser hosting an event for a candidate committee, or a professional fund raiser if the fund raiser is compensated at the usual and customary rate.

(5)(a) "Contribution" means:

(I) The payment, loan, pledge, gift, or advance of money, or guarantee of a loan, made to any candidate committee, issue committee, political committee, small donor committee, or political party;

(II) Any payment made to a third party for the benefit of any candidate committee, issue committee, political committee, small donor committee, or political party;

(III) The fair market value of any gift or loan of property made to any candidate committee, issue committee, political committee, small donor committee or political party;

(IV) Anything of value given, directly or indirectly, to a candidate for the purpose of promoting the candidate's nomination, retention, recall, or election.

(b) "Contribution" does not include services provided without compensation by individuals volunteering their time on behalf of a candidate, candidate committee, political committee, small donor committee, issue committee, or political party; a transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments by a corporation or labor organization for the costs of establishing, administering, and soliciting funds from its own employees or members for a political committee or small donor committee.

(6) "Election cycle" means either:

(a) The period of time beginning thirty-one days following a general election for the particular office and ending thirty days following the next general election for that office;

(b) The period of time beginning thirty-one days following a general election for the particular office and ending thirty days following the special legislative election for that office; or

(c) The period of time beginning thirty-one days following the special legislative election for the particular office and ending thirty days following the next general election for that office.

(7)(a) "Electioneering communication" means any communication broadcasted by television or radio, printed in a newspaper or on a billboard, directly mailed or delivered by hand to personal residences or otherwise distributed that:

(I) Unambiguously refers to any candidate; and

(II) Is broadcasted, printed, mailed, delivered, or distributed within thirty days before a primary election or sixty days before a general election; and

(III) Is broadcasted to, printed in a newspaper distributed to, mailed to, delivered by hand to, or otherwise distributed to an audience that includes members of the electorate for such public office.

(b) "Electioneering communication" does not include:

(I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;

(II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;

(III) Any communication by persons made in the regular course and scope of their business or any communication made by a membership organization solely to members of such organization and their families;

(IV) Any communication that refers to any candidate only as part of the popular name of a bill or statute.

(8)(a) "Expenditure" means any purchase, payment, distribution, loan, advance, deposit, or gift of money by any person for the purpose of expressly advocating the election or defeat of a candidate or supporting or opposing a ballot issue or ballot question. An expenditure is made when the actual spending occurs or when there is a contractual agreement requiring such spending and the amount is determined.

(b) "Expenditure" does not include:

(I) Any news articles, editorial endorsements, opinion or commentary writings, or letters to the editor printed in a newspaper, magazine or other periodical not owned or controlled by a candidate or political party;

(II) Any editorial endorsements or opinions aired by a broadcast facility not owned or controlled by a candidate or political party;

(III) Spending by persons, other than political parties, political committees and small donor committees, in the regular course and scope of their business or payments by a membership organization for any communication solely to members and their families;

(IV) Any transfer by a membership organization of a portion of a member's dues to a small donor committee or political committee sponsored by such membership organization; or payments made by a corporation or labor organization for the costs of establishing, administering, or soliciting funds from its own employees or members for a political committee or small donor committee.

(9) "Independent expenditure" means an expenditure that is not controlled by or coordinated with any candidate or agent of such candidate. Expenditures that are controlled by or coordinated with a candidate or candidate's agent are deemed to be both contributions by the maker of the expenditures, and expenditures by the candidate committee.

(10)(a) "Issue committee" means any person, other than a natural person, or any group of two or more persons, including natural persons:

(I) That has a major purpose of supporting or opposing any ballot issue or ballot question; or

(II) That has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question.

(b) "Issue committee" does not include political parties, political committees, small donor committees, or candidate committees as otherwise defined in this section.

(c) An issue committee shall be considered open and active until affirmatively closed by such committee or by action of the appropriate authority.

(11) "Person" means any natural person, partnership, committee, association, corporation, labor organization, political party, or other organization or group of persons.

(12)(a) "Political committee" means any person, other than a natural person, or any group of two or more persons, including natural persons that have accepted or made contributions or expenditures in excess of $ 200 to support or oppose the nomination or election of one or more candidates.

(b) "Political committee" does not include political parties, issue committees, or candidate committees as otherwise defined in this section.

(c) For the purposes of this article, the following are treated as a single political committee:

(I) All political committees established, financed, maintained, or controlled by a single corporation or its subsidiaries;

(II) All political committees established, financed, maintained, or controlled by a single labor organization; except that, any political committee established,

financed, maintained, or controlled by a local unit of the labor organization which has the authority to make a decision independently of the state and national units as to which candidates to support or oppose shall be deemed separate from the political committee of the state and national unit;

(III) All political committees established, financed, maintained, or controlled by the same political party;

(IV) All political committees established, financed, maintained, or controlled by substantially the same group of persons.

(13) "Political party" means any group of registered electors who, by petition or assembly, nominate candidates for the official general election ballot. "Political party" includes affiliated party organizations at the state, county, and election district levels, and all such affiliates are considered to be a single entity for the purposes of this article, except as otherwise provided in section 7.

(14)(a) "Small donor committee" means any political committee that has accepted contributions only from natural persons who each contributed no more than fifty dollars in the aggregate per year. For purposes of this section, dues transferred by a membership organization to a small donor committee sponsored by such organization shall be treated as pro-rata contributions from individual members.

(b) "Small donor committee" does not include political parties, political committees, issue committees, or candidate committees as otherwise defined in this section.

(c) For the purposes of this article, the following are treated as a single small donor committee:

(I) All small donor committees established, financed, maintained, or controlled by a single corporation or its subsidiaries;

(II) All small donor committees established, financed, maintained, or controlled by a single labor organization; except that, any small donor committee established, financed, maintained, or controlled by a local unit of the labor organization which has the authority to make a decision independently of the state and national units as to which candidates to support or oppose shall be deemed separate from the small donor committee of the state and national unit;

(III) All small donor committees established, financed, maintained, or controlled by the same political party;

(IV) All small donor committees established, financed, maintained, or controlled by substantially the same group of persons.

(15) "Unexpended campaign contributions" means the balance of funds on hand in any candidate committee at the end of an election cycle, less the amount of all unpaid monetary obligations incurred prior to the election in furtherance of such candidacy.

## COLO. CONST. ART. XXVIII, SECTION 3

Section 3. Contribution limits

(1) Except as described in subsections (2), (3), and (4) of this section, no person, including a political committee, shall make to a candidate committee, and no candidate committee shall accept from any one person, aggregate contributions for a primary or a general election in excess of the following amounts:

(a) Five hundred dollars to any one:

(I) Governor candidate committee for the primary election, and governor and lieutenant governor candidate committee, as joint candidates under *1-1-104, C.R.S.*, or any successor section, for the general election;

(II) Secretary of state, state treasurer, or attorney general candidate committee; and

(b) Two hundred dollars to any one state senate, state house of representatives, state board of education, regent of the university of Colorado, or district attorney candidate committee.

(2) No small donor committee shall make to a candidate committee, and no candidate committee shall accept from any one small donor committee, aggregate contributions for a primary or a general election in excess of the following amounts:

(a) Five thousand dollars to any one:

(I) Governor candidate committee for the primary election, and governor and lieutenant governor candidate committee, as joint candidates under *1-1-104, C.R.S.*, or any successor section, for the general election;

(II) Secretary of state, state treasurer, or attorney general candidate committee; and

(b) Two thousand dollars to any one state senate, state house of representatives, state board of education, regent of the university of Colorado, or district attorney candidate committee.

(3)(a) No political party shall accept aggregate contributions from any person, other than a small donor committee as described in paragraph (b) of this subsection (3), that exceed three thousand dollars per year at the state, county, district, and local level combined, and of such amount no more than twenty-five hundred dollars per year at the state level;

(b) No political party shall accept aggregate contributions from any small donor committee that exceed fifteen thousand dollars per year at the state, county, district, and local level combined, and of such amount no more than twelve thousand, five hundred dollars at the state level;

(c) No political party shall accept contributions that are intended, or in any way designated, to be passed through the party to a specific candidate's candidate committee;

(d) In the applicable election cycle, no political party shall contribute to any candidate committee more than twenty percent of the applicable spending limit set forth in section 4 of this article.

(e) Any unexpended campaign contributions retained by a candidate committee for use in a subsequent election cycle shall be counted and reported as contributions from a political party in any subsequent election for purposes of paragraph (d) of this subsection (3);

(4)(a) It shall be unlawful for a corporation or labor organization to make contributions to a candidate committee or a political party, and to make expenditures expressly advocating the election or defeat of a candidate; except that a corporation or labor organization may establish a political committee or small donor committee which may accept contributions or dues from employees, officeholders, shareholders, or members.

(b) The prohibition contained in paragraph (a) of this subsection (4) shall not apply to a corporation that:

(I) Is formed for the purpose of promoting political ideas and cannot engage in business activities; and

(II) Has no shareholders or other persons with a claim on its assets or income; and

(III) Was not established by and does not accept contributions from business corporations or labor organizations.

(5) No political committee shall accept aggregate contributions or pro-rata dues from any person in excess of five hundred dollars per house of representatives election cycle.

(6) No candidate's candidate committee shall accept contributions from, or make contributions to, another candidate committee, including any candidate committee, or equivalent entity, established under federal law.

(7) No person shall act as a conduit for a contribution to a candidate committee.

(8) Notwithstanding any other section of this article to the contrary, a candidate's candidate committee may receive a loan from a financial institution organized under state or federal law if the loan bears the usual and customary interest rate, is made on a basis that assures repayment, is evidenced by a written instrument, and is subject to a due date or amortization schedule. The contribution limits described in this section shall not apply to a loan as described in this subsection (8).

(9) All contributions received by a candidate committee, issue committee, political committee, small donor committee, or political party shall be deposited in a financial institution in a separate account whose title shall include the name of the

committee or political party. All records pertaining to such accounts shall be maintained by the committee or political party for one-hundred eighty days following any general election in which the committee or party received contributions unless a complaint is filed, in which case they shall be maintained until final disposition of the complaint and any consequent litigation. Such records shall be subject to inspection at any hearing held pursuant to this article.

(10) No candidate committee, political committee, small donor committee, issue committee, or political party shall accept a contribution, or make an expenditure, in currency or coin exceeding one hundred dollars.

(11) No person shall make a contribution to a candidate committee, issue committee, political committee, small donor committee, or political party with the expectation that some or all of the amounts of such contribution will be reimbursed by another person. No person shall be reimbursed for a contribution made to any candidate committee, issue committee, political committee, small donor committee, or political party, nor shall any person make such reimbursement except as provided in subsection (8) of this section.

(12) No candidate committee, political committee, small donor committee, or political party shall knowingly accept contributions from:

(a) Any natural person who is not a citizen of the United States;

(b) A foreign government; or

(c) Any foreign corporation that does not have the authority to transact business in this state pursuant to article 115 of title 7, C.R.S., or any successor section.

(13) Each limit on contributions described in subsections (1), (2), (3) (a), (3) (b) and (5) of this section, and subsection (14) of section 2, shall be adjusted by an amount based upon the percentage change over a four year period in the United States bureau of labor statistics consumer price index for Denver- Boulder-Greeley, all items, all consumers, or its successor index, rounded to the nearest lowest twenty-five dollars. The first adjustment shall be done in the first quarter of 2007 and then every four years thereafter. The secretary of state shall calculate such an adjustment in each limit and specify the limits in rules promulgated in accordance with article 4 of title 24, C.R.S., or any successor section.

## COLO. CONST. ART. XXVIII, SECTION 4

Section 4. Voluntary campaign spending limits

(1) Candidates may certify to the secretary of state that the candidate's candidate committee shall not exceed the following spending limits for the applicable election cycle:

(a) Two and one-half million dollars combined for a candidate for governor and governor and

lieutenant governor as joint candidates under *1-1-104, C.R.S.*, or any successor section;

(b) Five hundred thousand dollars for a candidate for secretary of state, attorney general, or treasurer;

(c) Ninety thousand dollars for a candidate for the state senate;

(d) Sixty-five thousand dollars for a candidate for the state house of representatives, state board of education, regent of the university of Colorado, or district attorney.

(2) Candidates accepting the campaign spending limits set forth above shall also agree that their personal contributions to their own campaign shall be counted as political party contributions and subject to the aggregate limit on such contributions set forth in section 3 of this article.

(3) Each candidate who chooses to accept the applicable voluntary spending limit shall file a statement to that effect with the secretary of state at the time that the candidate files a candidate affidavit as currently set forth in *section 1-45-110(1), C.R.S.*, or any successor section. Acceptance of the applicable voluntary spending limit shall be irrevocable except as set forth in subsection (4) of this section and shall subject the candidate to the penalties set forth in section 10 of this article for exceeding the limit.

(4) If a candidate accepts the applicable spending limit and another candidate for the same

office refuses to accept the spending limit, the accepting candidate shall have ten days in which to withdraw acceptance. The accepting candidate shall have this option of withdrawing acceptance after each additional non-accepting candidate for the same office enters the race.

(5) The applicable contribution limits set forth in section 3 of this article shall double for any candidate who has accepted the applicable voluntary spending limit if:

(a) Another candidate in the race for the same office has not accepted the voluntary spending limit; and

(b) The non-accepting candidate has raised more than ten percent of the applicable voluntary spending limit.

(6) Only those candidates who have agreed to abide by the applicable voluntary spending limit may advertise their compliance. All other candidates are prohibited from advertising, or in any way implying, their acceptance of voluntary spending limits.

(7) Each spending limit described in subsection (1) of this section shall be adjusted by an amount based upon the percentage change over a four year period in the united states bureau of labor statistics consumer price index for Denver-Boulder-Greeley, all items, all consumers, or its successor index, rounded to the nearest lowest twenty-five dollars. The first adjustment shall be done in the first quarter of 2007

and then every four years thereafter. The secretary of state shall calculate such an adjustment in each limit and specify the limits in rules promulgated in accordance with article 4 of title 24, C.R.S., or any successor section.

## COLO. CONST. ART. XXVIII, SECTION 5

Section 5. Independent expenditures

(1) Any person making an independent expenditure in excess of one thousand dollars per calendar year shall deliver notice in writing to the secretary of state of such independent expenditure, as well as the amount of such expenditure, and a detailed description of the use of such independent expenditure. The notice shall specifically state the name of the candidate whom the independent expenditure is intended to support or oppose. Each independent expenditure in excess of one-thousand dollars shall require the delivery of a new notice. Any person making an independent expenditure within thirty days of a primary or general election shall deliver such notice within forty-eight hours after obligating funds for such expenditure.

(2) Any person making an independent expenditure in excess of one thousand dollars shall disclose, in the communication produced by the expenditure, the name of the person making the expenditure and the specific statement that the advertisement of material is not authorized by any candidate. Such

disclosure shall be prominently featured in the communication.

(3) Expenditures by any person on behalf of a candidate for public office that are coordinated with or controlled by the candidate or the candidate's agent, or political party shall be considered a contribution to the candidate's candidate committee, or the political party, respectively.

(4) This section 5 applies only to independent expenditures made for the purpose of expressly advocating the defeat or election of any candidate.

## COLO. CONST. ART. XXVIII, SECTION 6

Section 6. Electioneering communications

(1) Any person who expends one thousand dollars or more per calendar year on electioneering communications shall submit reports to the secretary of state in accordance with the schedule currently set forth in *1-45-108(2), C.R.S.*, or any successor section. Such reports shall include spending on such electioneering communications, and the name, and address, of any person that contributes more than two hundred and fifty dollars per year to such person described in this section for an electioneering communication. In the case where the person is a natural person, such reports shall also include the occupation and employer of such natural person. The last such report shall be filed thirty days after the applicable election.

(2) Notwithstanding any section to the contrary, it shall be unlawful for a corporation or labor organization to provide funding for an electioneering communication; except that any political committee or small donor committee established by such corporation or labor organization may provide funding for an electioneering communication.

## COLO. CONST. ART. XXVIII, SECTION 7

Section 7. Disclosure

The disclosure requirements relevant to candidate committees, political committees, issue committees, and political parties, that are currently set forth in *section 1-45-108, C.R.S.*, or any successor section, shall be extended to include small donor committees. The disclosure requirements of *section 1-45-108, C.R.S.*, or any successor section, shall be extended to require disclosure of the occupation and employer of each person who has made a contribution of one hundred dollars or more to a candidate committee, political committee, issue committee, or political party. For purposes of this section and *1-45-108, C.R.S.*, or any successor section, a political party shall be treated as separate entities at the state, county, district, and local levels.

## COLO. CONST. ART. XXVIII, SECTION 8

Section 8. Filing – where to file – timeliness

The secretary of state shall promulgate rules relating to filing in accordance with article 4 of title 24, C.R.S., or any successor section. The rules promulgated pursuant to this section shall extend section 1-45-109, C.R.S., or any successor section to apply to small donor committees.

## COLO. CONST. ART. XXVIII, SECTION 9

Section 9. Duties of the secretary of state – enforcement

(1) The secretary of state shall:

(a) Prepare forms and instructions to assist candidates and the public in complying with the reporting requirements of this article and make such forms and instructions available to the public, municipal clerks, and county clerk and recorders free of charge;

(b) Promulgate such rules, in accordance with article 4 of title 24, C.R.S., or any successor section, as may be necessary to administer and enforce any provision of this article;

(c) Prepare forms for candidates to declare their voluntary acceptance of the campaign spending limits set forth in section 4 of this article. Such forms shall include an acknowledgment that the candidate voluntarily accepts the applicable spending limit and that

the candidate swears to abide by those spending limits. These forms shall be signed by the candidate under oath, notarized, filed with the secretary of state, and available to the public upon request;

(d) Maintain a filing and indexing system consistent with the purposes of this article;

(e) Make the reports and statements filed with the secretary of state's office available immediately for public inspection and copying. The secretary of state may charge a reasonable fee for providing copies of reports. No information copied from such reports shall be sold or used by any person for the purpose of soliciting contributions or for any commercial purpose;

(f) Refer any complaints filed against any candidate for the office of secretary of state to the attorney general. Any administrative law judge employed pursuant to this section shall be appointed pursuant to part 10 of article 30 of title 24, C.R.S., or any successor section. Any hearing conducted by an administrative law judge employed pursuant to subsection (2) of this section shall be conducted in accordance with the provisions of *section 24-4-105, C.R.S.*, or any successor section.

(2)(a) Any person who believes that a violation of section 3, section 4, section 5, section 6, section 7, or section 9(1)(e), of this article, or of *sections 1-45-108, 1-45-114, 1-45-115*, or *1-45-117 C.R.S.*, or any successor sections, has occurred may file a written complaint with the secretary of state no later than

one hundred eighty days after the date of the alleged violation. The secretary of state shall refer the complaint to an administrative law judge within three days of the filing of the complaint. The administrative law judge shall hold a hearing within fifteen days of the referral of the complaint, and shall render a decision within fifteen days of the hearing. The defendant shall be granted an extension of up to thirty days upon defendant's motion, or longer upon a showing of good cause. If the administrative law judge determines that such violation has occurred, such decision shall include any appropriate order, sanction, or relief authorized by this article. The decision of the administrative law judge shall be final and subject to review by the court of appeals, pursuant to *section 24-4-106(11), C.R.S.*, or any successor section. The secretary of state and the administrative law judge are not necessary parties to the review. The decision may be enforced by the secretary of state, or, if the secretary of state does not file an enforcement action within thirty days of the decision, in a private cause of action by the person filing the complaint. Any private action brought under this section shall be brought within one year of the date of the violation in state district court. The prevailing party in a private enforcement action shall be entitled to reasonable attorneys fees and costs.

(b) The attorney general shall investigate complaints made against any candidate for the office of secretary of state using the same procedures set forth in paragraph (a) of this subsection (2).

Complainant shall have the same private right of action as under paragraph (a) of this subsection (2).

(c) A subpoena issued by an administrative law judge requiring the production of documents by an issue committee shall be limited to documents pertaining to contributions to, or expenditures from, the committee's separate account established pursuant to section 3(9) of this article to support or oppose a ballot issue or ballot question. A subpoena shall not be limited in this manner where such issue committee fails to form a separate account through which a ballot issue or ballot question is supported or opposed.

## COLO. CONST. ART. XXVIII, SECTION 10

Section 10. Sanctions

(1) Any person who violates any provision of this article relating to contribution or voluntary spending limits shall be subject to a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provision of this article. Candidates shall be personally liable for penalties imposed upon the candidate's committee.

(2)(a) The appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to section 5, section 6, or section 7 of this article, or *sections 1-45-108*, *1-45-109* or *1-45-110, C.R.S.*, or any successor sections, is not filed by the

close of business on the day due. Upon imposition of a penalty pursuant to this subsection (2), the appropriate officer shall send the person upon whom the penalty is being imposed proper notification by certified mail of the imposition of the penalty. If an electronic mail address is on file with the secretary of state, the secretary of state shall also provide such notification by electronic mail. Revenues collected from fees and penalties assessed by the secretary of state or revenues collected in the form of payment of the secretary of state's attorney fees and costs pursuant to this article shall be deposited in the department of state cash fund created in *section 24-21-104(3), C.R.S.*, or any successor section.

(b)(I) Any person required to file a report with the secretary of state and upon whom a penalty has been imposed pursuant to this subsection (2) may appeal such penalty by filing a written appeal with the secretary of state no later than thirty days after the date on which notification of the imposition of the penalty was mailed to such person's last known address in accordance with paragraph (a) of this subsection (2). Except as provided in paragraph (c) of this subsection (2), the secretary shall refer the appeal to an administrative law judge. Any hearing conducted by an administrative law judge pursuant to this subsection (2) shall be conducted in accordance with the provisions of *section 24-4-105, C.R.S.*, or any successor section. The administrative law judge shall set aside or reduce the penalty upon a showing of good cause, and the person filing the appeal shall bear the burden of proof. The decision of the

administrative law judge shall be final and subject to review by the court of appeals pursuant to *section 24-4-106(11), C.R.S.*, or any successor section.

(II) If the administrative law judge finds that the filing of an appeal brought pursuant to sub-paragraph (I) of this paragraph (b) was frivolous, groundless, or vexatious, the administrative law judge shall order the person filing the appeal to pay reasonable attorney fees and costs of the secretary of state in connection with such proceeding.

(c) Upon receipt by the secretary of state of an appeal pursuant to paragraph (b) of this subsection (2), the secretary shall set aside or reduce the penalty upon a showing of good cause.

(d) Any unpaid debt owing to the state resulting from a penalty imposed pursuant to this subsection (2) shall be collected by the state in accordance with the requirements of *section 24-30-202.4, C.R.S.*, or any successor section.

(3) Failure to comply with the provisions of this article shall have no effect on the validity of any election.

## COLO. CONST. ART. XXVIII, SECTION 11

Section 11. Conflicting provisions declared inapplicable

Any provisions in the statutes of this state in conflict or inconsistent with this article are hereby declared to be inapplicable to the matters covered and provided for in this article.

## COLO. CONST. ART. XXVIII, SECTION 12

Section 12. Repeal of conflicting statutory provisions

*Sections 1-45-103, 1-45-105.3, 1-45-107, 1-45-111,* and *1-45-113* are repealed.

## COLO. CONST. ART. XXVIII, SECTION 13

Section 13. APPLICABILITY AND EFFECTIVE DATE

The provisions of this article shall take effect on December 6, 2002 and be applicable for all elections thereafter. Legislation may be enacted to facilitate its operations, but in no way limiting or restricting the provisions of this article or the powers herein granted.

## COLO. CONST. ART. XXVIII, SECTION 14

Section 14. Severability

If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable.

## COLO. REV. STAT. § 1-45-108

1-45-108. Disclosure

(1)(a)(I) All candidate committees, political committees, issue committees, small donor committees, and political parties shall report to the appropriate officer their contributions received, including the name and address of each person who has contributed twenty dollars or more; expenditures made, and obligations entered into by the committee or party.

(II) In the case of contributions made to a candidate committee, political committee, issue committee, and political party, the disclosure required by this section shall also include the occupation and employer of each person who has made a contribution of one hundred dollars or more to such committee or party.

(III) Any person who expends one thousand dollars or more per calendar year on electioneering communications shall report to the secretary of state, in accordance with the disclosure required by this section, the amount expended on the communications and the name and address of any person that contributes more than two hundred fifty dollars per year to the person expending one thousand dollars or more on the communications. If the person making such contribution of two hundred fifty dollars or more is a natural person, the disclosure required by this section shall also include the person's occupation and employer.

(IV) In the case of a limited liability company, the disclosure required by this section shall include, in addition to any other information required to be disclosed, each contribution from the limited liability company regardless of the dollar amount of the contribution.

(b) (Deleted by amendment, L. 2003, p. 2158, § 3, effective June 3, 2003.)

(c) A candidate committee in a special district election shall not be required to file reports under this section until the committee has received contributions or made expenditures exceeding twenty dollars in the aggregate.

(d) For purposes of this section, a political party shall be treated as a separate entity at the state, county, district, and local levels.

(e) A candidate's candidate committee may reimburse the candidate for expenditures the candidate has made on behalf of the candidate committee. Any such expenditures may be reimbursed at any time. Notwithstanding any other provision of law, any expenditure reimbursed to the candidate by the candidate's candidate committee within the election cycle during which the expenditure is made shall be treated only as an expenditure and not as a contribution to and an expenditure by the candidate's candidate committee. Notwithstanding the date on which any such expenditure is reimbursed, the expenditure shall be reported at the time it is made in accordance with the requirements of this section.

(2)(a)(I) Except as provided in subsections (2.5), (2.7), and (6) of this section, such reports that are required to be filed with the secretary of state shall be filed:

(A) Quarterly in off-election years no later than the fifteenth calendar day following the end of the applicable quarter;

(B) On the first Monday in July and on each Monday every two weeks thereafter before the primary election;

(C) On the first day of each month beginning the sixth full month before the major election; except that no monthly report shall be required on the first day of the month in which the major election is held;

(D) On the first Monday in September and on each Monday every two weeks thereafter before the major election;

(E) Thirty days after the major election in election years; and

(F) Fourteen days before and thirty days after a special legislative election held in an off-election year.

(II) Such reports that are required to be filed with the county clerk and recorder or with the municipal clerk shall be filed on the twenty-first day and on the Friday before and thirty days after the primary election, where applicable, and the major election in election years and annually in off-election

years on the first day of the month in which the anniversary of the major election occurs.

(III) For purposes of this section, "election year" means every even numbered year for political parties and political committees and each year in which the particular candidate committee's candidate, or issue committee's issue, appears on the ballot; and "major election" means the election that decides an issue committee's issue and the election that elects a person to the public office sought by the candidate committee's candidate.

(IV) If the reporting day falls on a weekend or legal holiday, the report shall be filed by the close of the next business day.

(b) The reports required by this section shall also include the balance of funds at the beginning of the reporting period, the total of contributions received, the total of expenditures made during the reporting period, and the name and address of the financial institution used by the committee or party.

(c) All reports filed with the secretary of state pursuant to this subsection (2) shall be for the reporting periods established pursuant to rules promulgated by the secretary of state in accordance with article 4 of title 24, C.R.S.

(d) A candidate committee for a former officeholder or a person not elected to office that has no change in the balance of funds maintained by such committee, receives no contributions, makes no

expenditures, and enters into no obligations during a reporting period shall not be required to file a report under this section for such period.

(e) The reporting period for all reports required to be filed with the county clerk and recorder or with the municipal clerk shall close five calendar days prior to the effective date of filing.

(2.3) Repealed.

(2.5) In addition to any report required to be filed with the secretary of state under this section, all candidate committees, political committees, issue committees, and political parties shall file a report with the secretary of state of any contribution of one thousand dollars or more at any time within thirty days preceding the date of the primary election or general election. This report shall be filed with the secretary of state no later than twenty-four hours after receipt of said contribution.

(2.7) Any candidate or candidate committee supporting any candidate, including an incumbent, in a recall election, shall file reports of contributions and expenditures with the appropriate officer fourteen and seven days before the recall election and thirty days after the recall election.

(3) Except as otherwise provided in subsection (3.5) of this section, all candidate committees, political committees, issue committees, small donor committees, and political parties shall register with the appropriate officer before accepting or making

any contributions. Registration shall include a statement listing:

(a) The organization's full name, spelling out any acronyms used therein;

(b) A natural person authorized to act as a registered agent;

(c) A street address and telephone number for the principle place of operations;

(d) All affiliated candidates and committees;

(e) The purpose or nature of interest of the committee or party;

(f) Any intent of the candidate committee, political committee, issue committee, small donor committee, or political party to electronically file reports required by this article that may be filed electronically on a web site operated and maintained by the secretary of state pursuant to *section 1-45-109*.

(3.5) Any political committee that has registered with the federal election commission may file with the appropriate officer a copy of the registration filed with the federal election commission and, insofar as such registration contains substantially the same information required by subsection (3) of this section, the political committee shall be considered to have registered with the appropriate officer for purposes of subsection (3) of this section and, therefore, shall be authorized to accept or make contributions as permitted by law. Any political committee that

satisfies the requirements of this subsection (3.5) shall be subject to all other legal requirements pertaining to contributions and disclosure that are applicable to political committees.

(4) For purposes of subsection (3) of this section, a political committee in existence on January 1, 1997, shall register with the secretary of state on or before April 1, 1997, pursuant to the requirements of this act.

(5) The registration and reporting requirements of this section shall not apply to that part of the organizational structure of a political party which is responsible for only the day-to-day operations of such political party at the national level if copies of the reports required to filed with the Federal Election Commission pursuant to the "Federal Election Commission Act of 1971", as amended, are filed with the secretary of state and include the information required by this section.

(6) Any issue committee whose purpose is the recall of any elected official shall file a committee registration with the appropriate officer within ten business days of receiving its first contribution. Reports of contributions and expenditures shall be filed with the appropriate officer within fifteen days of the filing of the committee registration and every thirty days thereafter until the date of the recall election has been established and then fourteen days

and seven days before the recall election and thirty days following the recall election.

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**COLO. REV. STAT. § 1-45-109**

1-45-109. Filing – where to file – timeliness

(1) For the purpose of meeting the filing and reporting requirements of this article, candidates for state wide office, the general assembly, district attorney, district court judge, or any office representing more than one county, except candidates for school district director; the candidate committees for such candidates; political committees in support of or in opposition to such candidates; issue committees in support of or in opposition to an issue on the ballot in more than one county; small donor committees making contributions to such candidates; and persons expending one thousand dollars or more per calendar year on electioneering communications shall file with the secretary of state. Candidates in municipal elections, their candidate committees, any political committee in support of or in opposition to such candidate, an issue committee supporting or opposing a municipal ballot issue, and small donor committees making contributions to such candidates shall file with the municipal clerk. Candidates in special district elections, except candidates for director of the regional transportation district; the candidate committees of such candidates; political committees in support of or in opposition to such candidates; issue committees supporting or opposing a special district

ballot issue; and small donor committees making contributions to such candidate shall file with the clerk and recorder of the county in which the district court having jurisdiction over the special district pursuant to *section 32-1-303, C.R.S.*, is located. All other candidates, candidate committees, issue committees, political committees, and small donor committees shall file with the county clerk and recorder of the county of their residence. However, a report required to be filed with a county clerk and recorder shall be deemed properly filed if filed electronically pursuant to subsection (8) of this section.

(2)(a) Reports required to be filed by this article are timely if received by the appropriate officer not later than the close of business on the due date. Reports may be filed by fax and are timely if received by the appropriate officer not later than the close of business on the due date only if an original of the report is received by the appropriate officer within seven days of the due date.

(b) A person upon whom a penalty has been imposed for failure to file a statement or other information required to be filed pursuant to *section 5, 6,* or *7 of article XXVIII of the state constitution* or *section 1-45-108*, this section, or *section 1-45-110* by the due date may appeal the penalty by filing a written appeal with the appropriate officer no later than thirty days after the date on which notification of the imposition of the penalty was mailed to the person's last-known address. Upon receipt of an appeal pursuant to this paragraph (b), the appropriate

officer shall set aside or reduce the penalty upon a showing of good cause.

(3) In addition to any other reporting requirements of this article, every incumbent in public office and every candidate elected to public office is subject to the reporting requirements of *section 24-6-203 C.R.S.*

(4)(a) All reports required to be filed by this article are public records and shall be open to inspection by the public during regular business hours. A copy of the report shall be kept by the appropriate officer and a copy shall be made available immediately in a file for public inspection.

(b) Any report that is deemed to be incomplete by the appropriate officer shall be accepted on a conditional basis and the committee or party treasurer shall be notified by mail as to any deficiencies found. If an electronic mail address is on file with the secretary of state, the secretary of state may also provide such notification by electronic mail. The committee or party treasurer shall have seven business days from the date of mailing such notice to file an addendum that cures the deficiencies.

(5)(a) The secretary of state shall operate and maintain a web site so as to allow any person who wishes to review reports filed with the secretary of state's office or with a county clerk and recorder pursuant to this article electronic read-only access to such reports free of charge.

(b) All reports required to be filed by this article that are electronically filed pursuant to subsection (6) of this section shall be made available immediately on the web site.

(c) The web site shall enable a user to produce summary reports based on search criteria that shall include, but not be limited to the reporting period, date, name of the person making a contribution or expenditure, candidate, and committee.

(d) At the earliest practicable date, the secretary of state shall develop and implement improvements to the web site's design and structure to improve the public's ability to navigate, search, browse, download, and analyze information. Such improvements shall include but need not be limited to:

(I) Enhanced searching and summary reporting, including additional search fields such as zip code, employer, and vendor, the ability to search across multiple committees and all filers, the ability to filter or limit searches, such as by election cycle or candidate, the inclusion of smart-search features such as "name sounds like" or "name contains", and numerical totaling of amounts shown on search results;

(II) Features that facilitate the ability to download raw data and search results in one or more common formats to enable offline sorting and analyzing;

(III) Detailed, technical instructions for users;

(IV) Information to help users determine the scope of candidates' and committees' reports and campaign data available online, including explanations of which types of reports are available, the period covered by the online data, and which specific reports can be viewed for each campaign committee; and

(V) Resources that give the public comparative context when viewing campaign finance data, such as compilations of the total amounts of money raised and spent by individual candidates, lists of total amounts raised and spent by all statewide and legislative candidates, and compilations of fundraising and spending across candidates and election cycles.

(e) The secretary of state may promulgate rules necessary for the implementation of this subsection (5). Such rules shall be promulgated in accordance with article 4 of title 24, C.R.S.

(6)(a) The secretary of state shall establish, operate, and maintain a system that enables electronic filing using the internet of the reports required by this article to be filed with the secretary of state's office or with a county clerk and recorder. The rules for use of the electronic filing system shall be promulgated by the secretary of state in accordance with article 4 of title 24, C.R.S.

(b) In addition to any other method of filing, any person required to file with the secretary of state's office or with a county clerk and recorder may

use the electronic filing system described in paragraph (a) of this subsection (6) in order to meet the filing requirements of this article. Where a person uses such electronic filing system to meet the filing requirements of this article, the secretary of state shall acknowledge by electronic means the receipt of such filing.

(7) (Deleted by amendment, L. 2007, p. 1296, § 1, effective July 1, 2007.)

(8)(a) (Deleted by amendment, L. 2007, p. 1296, § 1, effective July 1, 2007.)

(b)(I) (Deleted by amendment, L. 2007, p. 1296, § 1, effective July 1, 2007.)

(II) Each county clerk and recorder shall use the electronic filing system described in subsection (6) of this section to transmit any report filed with the county clerk and recorder to the secretary of state.

(III) A county clerk and recorder shall transmit any report to be transmitted to the secretary of state pursuant to subparagraph (II) of this paragraph (b) as quickly as practicable. The county clerk and recorder shall convert any report that is not electronically filed into electronic format before transmitting the report to the secretary of state.

(c)(I) (Deleted by amendment, L. 2007, p. 1296, § 1, effective July 1, 2007.)

(II) Any person required to file reports with a county clerk and recorder pursuant to this article

may meet the filing requirements by using the electronic filing system described in subsection (6) of this section.

(9) Subsections (1) and (8) of this section shall not be construed to require the secretary of state to review reports electronically filed by persons required to file reports with a county clerk and recorder pursuant to this article or to impose any enforcement duties upon the secretary of state beyond the duties specified in *section 9 of article XXVIII of the state constitution.*

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**COLO. REV. STAT. § 1-45-111.5**

1-45-111.5. Duties of the secretary of state – enforcement – sanctions

(1) The secretary of state shall promulgate such rules, in accordance with article 4 of title 24, C.R.S., as may be necessary to enforce and administer any provision of this article.

(1.5)(a) Any person who believes that a violation of either the secretary of state's rules concerning campaign and political finance or this article has occurred may file a written complaint with the secretary of state not later than one hundred eighty days after the date of the occurrence of the alleged violation. The complaint shall be subject to all applicable procedures specified in *section 9(2) of article XXVIII of the state constitution.*

(b) Any person who commits a violation of either the secretary of state's rules concerning campaign and political finance or this article that is not specifically listed in *section 9(2)(a) of article XXVIII of the state constitution* shall be subject to any of the sanctions specified in *section 10 of article XXVIII of the state constitution* or in this section.

(2) A party in any action brought to enforce the provisions of article XXVIII of the state constitution or of this article shall be entitled to the recovery of the party's reasonable attorney fees and costs from any attorney or party who has brought or defended the action, either in whole or in part, upon a determination by the office of administrative courts that the action, or any part thereof, lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Colorado rules of civil procedure. Notwithstanding any other provision of this subsection (2), no attorney fees may be awarded under this subsection (2) unless the court or administrative law judge, as applicable, has first considered the provisions of *section 13-17-102(5)* and (6), C.R.S. For purposes of this subsection (2), "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

## 8 COLO. REGS. § 1505-6(1)

1. Definitions

1.1 "Business Activities". For the purposes of Article XXVIII, Section 3(4)(b)(I) and Rule 4.12 of these rules:

a. "Business activities" means any commercial activity involving the sale or exchange of goods or services, whether or not for profit, and any activity conducted for the production of revenue, other than the solicitation of voluntary donations.

b. "Cannot engage in business activities," means that the articles of incorporation and by-laws, either expressly or implicitly, prohibits the corporation from engaging in any business activities.

1.2 "Contribution in support of the candidacy" shall include all contributions given directly or indirectly for a specific public office, including those to a person who maintains a candidate committee after an election cycle, but who has not publicly announced an intention to seek election to public office in the next or any subsequent election cycle. [Article XXVIII, Section 2(2)]

1.3 "Contribution".

a. "Contribution" does not include an endorsement of a candidate or an issue by any person.

b. The exception stated in section 2(5)(b) of the State Constitution that "'Contribution' does not include services provided without compensation by

individuals volunteering their time", applies only to services provided solely on the basis of time (such as legal advice, bookkeeping, computer consulting and programming, web mastering, etc.). The exception may include time-based services volunteered by an individual as a member of any firm, association, or other business entity, including a corporation, if such individual receives no direct or indirect compensation for the time volunteered. If a tangible product is produced as a result of such services, "contribution" includes the reasonable value of the materials involved, unless such value is negligible.

1.4 "Corporation", as used in Article XXVIII, shall have the same meaning as set forth in *section 1-45-103(7), C.R.S.*

1.5 "Foreign Corporation", as used in Article XXVIII, Section 3(12)(c), means a corporation organized under the laws of another country. The term does not apply to a corporation organized under the laws of another state.

1.6 "Issue", as used in Article XXVIII of the Colorado Constitution and Article 45 of Title 1, C.R.S., shall mean a "ballot issue" or "ballot question" as such terms are defined in section 1-1-104(2.3) and (2.7), C.R.S. For the purposes Article XXVIII, section 2(10) of the Colorado Constitution, a matter shall be considered an "issue" at the earliest of the following:

a. It has had a title designated and fixed in accordance with law;

b. It has been referred to the voters by a governing board or the general assembly;

c. In the case of a citizen referendum petition, it has been submitted for format approval in accordance with law;

d. a petition has been circulated and signed by at least one person; except that, where a matter becomes an "issue" upon such signing, a person or persons opposing such issue shall not be considered an "issue committee" until one such person knows or has reason to know of the circulation; or

1.7 "Issue committee"

a. "Issue committee" does not include a married couple.

b. A person or group of persons is an issue committee only if it meets both of the conditions in Article XXVIII, Section 2(10)(a)(I) and 2(10)(a)(II).

1.8 "Person".

a. A "natural person" is a human being.

b. For the purpose of Article XXVIII, Section 7, "person" shall mean any natural person.

1.9 "Per year" means "per calendar year".

1.10 "Political Committee" does not include a married couple.

1.11 "Public office" means any office voted for in this state at any election. "Public office" does not

include the office of president or vice president of the United States, the office of senator or representative in the Congress of the United States, or any office in a political party.

1.12 "Publicly announced an intention to seek election to public office or retention of a judicial office" means that a person has made a statement signifying an interest in the office by means of a speech, advertisement, or other communication reported or appearing in public media or in any place accessible to the public. Such statement includes a stated intention to explore the possibility of seeking an office. The registration of a candidate committee shall also constitute a public announcement of an intention to seek election or retention. [Article XXVIII, Section 2 (2)]

1.13 A registered agent or a committee or party treasurer for the purposes of Title 1, Article 45, shall be an individual or candidate designated to receive mailings and to address concerns and/or questions regarding the candidate committee, the political committee, the small donor committee, the issue committee, or the political party. [1-45-108(3)(b) and 1-45-109(4)(b)]

1.14 "Signature", for purposes of any report filed electronically with the secretary of state, means the committee's identification number, and "signing", means the electronic transmission of the committee's identification number to the secretary of state with the report being filed.

1.15 A "member", as used in Article XXVIII, Sections 2(5)(b), 2(8)(b)(IV), and 2(14)(a) only, is a person who:

a. Pays membership dues; and

b. [expired 5/15/07]

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**8 COLO. REGS. § 1505-6(3)**

3. Responsibilities of Candidate Committees, Issue Committees, Political Committees, Small Donor Committees and Political Parties

3.1 Whenever any of the information disclosed on the committee registration form changes, the change must be reported within five days by filing an amended committee registration form with the appropriate filing officer. When filing an amendment to the committee registration form, a new form should be completed that includes any updated information. The form must be signed by the registered agent, and, if for a candidate committee, the candidate must also sign the form. [1-45-108(3)]

3.2 Any political committee that has registered with the Federal Election Commission, and filed a copy of the registration filed with the Federal Election Commission with the appropriate officer, may terminate its active status with the appropriate officer if the committee submits a letter of termination. A termination letter may be filed at any time.

3.3 A candidate committee that changes elective office sought shall terminate the existing candidate committee and register a new candidate committee not later than ten days after such change. If the new elective office is for a state candidate, then all contributions received shall be subject to contribution limits and restrictions set forth in Article XXVIII, Section 3 for the new office.

3.4 A committee may terminate if the following conditions are met: the candidate or committee no longer intends to receive contributions or make expenditures; a zero balance is achieved by having no cash on hand and no outstanding debts or obligations; and the candidate or committee files a termination statement of contributions and expenditures. A termination statement may be filed at any time. [Article XXVIII, Section 2(3) and 1-45-106]

3.5 A political committee may change status to a small donor committee without terminating the political committee if the political committee has never accepted contributions over the amount of $ 50 per natural person per year.

3.6 Unexpended campaign contributions to a candidate committee may be contributed to a candidate committee established by the same candidate for a different public office, subject to the limitations set forth in Article XXVIII, Section 3(3)(e), if the candidate committee making such a contribution is affirmatively closed by the candidate no later than ten days after the date such a contribution is made.

3.7 Unexpended campaign contributions to local candidate committees may not be contributed to a state candidate committee.

3.8 Multi-purpose issue committees – termination of status. In the case of an issue committee whose purposes are not limited to supporting or opposing ballot issues or ballot questions (a "multi-purpose issue committee"), such multi-purpose issue committee may terminate its status as an issue committee by filing a termination statement of contributions and expenditures with the appropriate filing officer. In accordance with Rule 3.4, a termination statement may be filed at any time if the following conditions are met:

a. the multi-purpose issue committee no longer has a major purpose of supporting or opposing any ballot issue or ballot question and no longer intends to accept or make contributions or expenditures to support or oppose a ballot issue or ballot question; and

b. the committee's separate account maintained in accordance with Article XXVIII, section 3(9) has achieved a zero balance by having no cash on hand and no outstanding debts or obligations.

3.9 Contributions Where the Identity of the Contributor is Unknown.

a. Contributions received by a candidate committee, political committee, political party committee, or small donor committee, of any amount, where the

identity of the contributor is unknown, shall not be retained. Such contributions must, within thirty (30) days, be donated to any charitable organization recognized by the Internal Revenue Service, or transmitted to the State Treasurer for deposit into the unclaimed property fund or such other fund as the State Treasurer may direct.

b. Contributions received by an issue committee in excess of twenty dollars ($ 20) where the identity of the contributor is unknown, shall not be retained. Such contributions must, within thirty (30) days, be donated to any charitable organization recognized by the Internal Revenue Service, or transmitted to the State Treasurer for deposit into the unclaimed property fund or such other fund as the State Treasurer may direct.

3.10 Disposition of debt in anticipation of committee termination

a. Notwithstanding any negative balance for a prior election cycle, all contributions received by a candidate committee in the current election cycle shall be subject to the limits on contributions for the current election cycle and shall be reported as contributions for the current election cycle.

b. Any financial obligations incurred by a candidate committee in an election cycle that are not paid within a commercially reasonable period of time, not to exceed six (6) months after the close of that election cycle, shall be treated as "contributions" from the service provider or vendor extending credit.

c. In accordance with Article XXVIII, section 10(1) of the Colorado Constitution, where the treatment of such financial obligations as "contributions" results in a violation of any limit on contributions, a candidate shall be personally liable for any penalties imposed upon the committee.

d. Any service provider or vendor extending credit who has made a commercially reasonable attempt to collect such debt shall not be considered to have made a "contribution." An attempt to collect such debt shall be considered commercially reasonable if the service provider or vendor has pursued its remedies as vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.

**8 COLO. REGS. § 1505-6(4)**

4. Disclosure – Contributions and Expenditures

4.1 All committees must keep a record of all contributions. All contributions received of $ 20 or more during a reporting period shall be listed individually on the contribution and expenditure report. All other receipts and contributions under $ 20 may be reported in total as non-itemized contributions for the reporting period. [1-45-108(1)]

4.2 When manually filing an amended report of contributions and expenditures, a new form shall be completed that includes the cover page of the report of contributions and expenditures, the detailed

summary page, and any updated schedules listing only the amended information. [*C.R.S. 1-45-109(4)(b)*]

4.3 Contributions – when counted.

a. A contribution is considered made or received as of the date that it is accepted by the committee or party. In the case of a contribution by check or credit card, the date accepted is the date that the contribution is deposited into the committee's or party's account.

b. However, for purposes of section 1-45-105.5, concerning contributions by lobbyists to certain state officers and candidates when legislation is under consideration, a contribution is considered made or promised when possession of the check is transferred to any person not under the control of the issuer.

4.4 All committees must keep a record of all expenditures. All expenditures made of $ 20 or more during a reporting period shall be listed individually on the contribution and expenditure report. All other expenditures under $ 20 during a reporting period may be reported in total as non-itemized expenditures. [1-45-108(1)]

4.5 Loans received by a committee or Party

a. All loans received by a committee or party must be reported continuously until repaid. [Article XXVIII, Section 3(8)]

b. Notwithstanding Article XXVIII, Section 3(8), a candidate may make a loan to his or her candidate

committee. Such loan shall be at no interest. In accordance with the definition of "contribution" in Article XXVIII, section 2(5), the amount of the loan is a contribution from the candidate to the committee, but the interest-free use of such loan by the committee is not a contribution to the committee.

c. Any repayment of a loan shall be considered a returned contribution, except that interest repaid for a loan made pursuant to Article XXVIII, Section 3(8) shall be reported as an expenditure by the candidate committee.

d. A loan made by a candidate to the candidate's own committee may be forgiven by the candidate. The amount of unpaid debt forgiven by the candidate shall remain a contribution and shall not be considered a returned contribution.

e. loans made from a financial institution to a candidate committee pursuant to Article XXVIII, Section 3(8) shall not be forgiven.

4.6 Contributions by candidate – voluntary spending limits – loans.

a. Contributions to a candidate's own committee by a candidate who does not accept voluntary spending limits shall not be subject to the contribution limits of Article XXVIII, Section 3.

b. Contributions to a candidate's own committee by a candidate who does accept voluntary spending limits shall be counted toward the limit on political

party contributions set forth in Article XXVIII, Section 3(3)(d), and Section 4(2).

c. Candidates who have accepted voluntary spending limits may make loans to his or her candidate committee whose aggregate total may exceed the allowable limit established in Article XXVIII, Section 3 and Section 4(2) so long as the unpaid balance of any loans does not exceed the allowable limit at any time.

4.7 Candidate committees may share expenditures for costs of brochures, offices, office equipment, etc. if each candidate committee pays for its proportionate cost of the expense. If one candidate committee pays the entire cost, the reimbursement by the other candidate committee(s) shall be made within thirty (30) days. Such reimbursement is not a "contribution" from one committee to the other; it shall be reported as an expenditure by the reimbursing committee and as a returned expenditure by the reimbursed committee. If sharing expenditures results in a price discount based on volume or quantity, such discount shall not be considered a "contribution".

4.8 Any contributions received in excess of contribution limits shall be returned to the contributor within thirty (30) days.

4.9 Disclosure of Occupation and Employer

4.9.1 The requirement to disclose the occupation and employer of a contributor in Article XXVIII,

section 7 of the Colorado Constitution and *section 1-45-108, C.R.S.*, applies to any one-time contribution of $ 100 or more, and not to aggregate contributions totaling $ 100 or more.

4.9.2 If occupation and employer information as required by Article XXVIII, Section 7 is not provided, and the committee is unable to gather the information within 30 days after receipt of the contribution, the contribution shall be returned to the contributor no later than the 31st day after receipt.

4.10 The following rules relate to Article XXVIII, Section 3(3)(e), concerning the counting and reporting of unexpended campaign contributions retained for use in a subsequent election cycle.

a. A candidate committee shall not list such retained amounts expressly on disclosure reports as "contributions from a political party" or as contributions from any specific political party.

b. If the amount retained is less than the limit on contributions from a political party specified in Section 3(3)(d), then the total of all political party contributions to the candidate committee during the subsequent election cycle shall not exceed the difference between the amount retained and the limit on political party contributions. At such time as the total amount of all political party contributions to the candidate committee during the subsequent election cycle equals or exceeds the difference between the retained amount and the limit on political party contributions, then any subsequent or additional

contribution by a political party to the candidate committee during the subsequent election cycle shall constitute a violation of Section 3(3)(d).

4.11 For purposes of complying with the requirement of Article XXVIII, Section 5, that a notice of independent expenditure include "a detailed description of the use of such independent expenditure", such notice is sufficient if it includes an identification of the payee of the expenditure, the medium used for the communication, the date or dates for broadcast, delivery, or publication of the communication, and either the complete written text or transcript of the communication produced by the expenditure or a summary of the major points contained within the communication.

4.12 Article XXVIII, Section 6(2), concerning the prohibition against funding by corporations and labor organizations for electioneering communications, shall not apply to any corporation that:

a. Was formed for the purpose of promoting political ideas and cannot engage in business activities;

b. Has no shareholders with a claim on its assets or other income; and

c. Was not established by, and does not accept contributions from business corporations or labor organizations.

4.13 A candidate who does not accept contributions but who expends money for campaign purposes

shall not be required to form a candidate committee, but shall file disclosure reports for the reporting periods during which expenditures are made, in accordance with sections 1-45-108 and 1-45-109.

4.14 Membership dues transferred to small donor committees, and Political Committees.

a. Membership organizations transferring a portion of a member's dues to a small donor committee or political committee shall provide the respective committee with the member's name, address, amount of dues transferred, and the date of the dues transfer.

b. Each small donor committee and political committee shall keep records of all contributions received in the form of membership dues transferred by a membership organization to the committee. Such records shall include each contributing member's name, address, and amount of the dues transferred. [*C.R.S. 1-45-108(1)(a)(I)*]

c. Each small donor committee and political committee shall itemize and report the name and address of each person who has contributed $ 20 or more in a reporting period, including but not limited to contributions received in the form of membership dues transferred by a membership organization to the committee. [Article XXVIII, Section 2(14)(a); *C.R.S. 1-45-108(1)(a)*]

d. On each disclosure report, the candidate or registered agent of a candidate committee, political party committee, political committee, small donor

committee, or issue committee shall certify and declare, under penalty of perjury, that to the best of his or her knowledge or belief all contributions received in a reporting period, including contributions received in the form of membership dues transferred by a membership organization, are from permissible sources. [Article XXVIII, Section 3.]

4.15 Multi-purpose issue committees. In the case of an issue committee whose purposes are not limited to supporting or opposing ballot issues or ballot questions (a "multi-purpose issue committee"):

a. Such multi-purpose issue committee shall report only those contributions accepted, expenditures made, and obligations entered into for the purpose of supporting or opposing ballot issues or ballot questions. A multi-purpose issue committee shall not be required to report donations, membership dues, or any other receipts except to the extent they are designated or intended to be used for the purpose of supporting or opposing one or more ballot issues or ballot questions.

b. Contributions accepted for the purpose of supporting or opposing ballot issues or ballot questions shall be deposited in an account separate from other funds of the issue committee in accordance with Article XXVIII, Section 3(9). If the issue committee accepts contributions relating to more than one ballot issue or ballot question, such contributions may be deposited in a separate account for each ballot issue or ballot question.

c. If a multi-purpose issue committee receives general, non-earmarked donations, membership dues, or other payments, and later chooses to allocate some or all of such non-earmarked contributions to support or oppose a ballot issue or ballot question, then the committee must transfer the funds into a separate campaign account maintained in accordance with Article XXVIII, Section 3(9) and report the transfer as a contribution from the committee itself.

4.16 Until terminated in accordance with these rules, a committee shall file a disclosure report for every reporting period, even if the committee has no activity (expenditures or contributions) to report during the reporting period

4.17 The unexpended balance shall be reported as the ending balance throughout the election cycle. Unexpended balances from the final report filed thirty days after the applicable election shall be reported as the beginning balance in the next election cycle.

4.18 In accordance with Article XXVIII, section 3(9) of the Colorado Constitution, the requirement that committee funds be deposited into "a financial institution" shall not mean that all committee funds must be deposited into one single bank, credit union, or other commercial financial institution.

4.19 Investment of funds

4.19.1 A candidate committee, issue committee, political committee, small donor committee, or political

party may invest the committee's funds in any type of account or instrument of a government regulated financial institution.

4.19.2 Any change in the balance of funds resulting solely from the accrual of interest or dividends to the account and/or the automatic deduction of periodic service fees is not a contribution or an expenditure and shall not be subject to contribution limits, but shall be disclosed as miscellaneous income or expense on any disclosure report for which the interest, dividend, or service fee was received or charged.

4.20 Political organizations. In the case of political organizations as defined in *section 1-45-103(14.5), C.R.S.*:

4.20.1 Pursuant to *1-45-108.5, C.R.S.*, political organizations shall only report contributions and expenditures for the purpose of "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office."

4.20.2 Political organizations shall file according to the filing schedules set forth in *section 1-45-108(2), C.R.S.*

a. For the purposes of this Rule, "off-election year" for a political organization shall mean every odd numbered year.

b. For the purposes of this Rule, "major election" shall mean an election held in November of an even numbered year.

4.20.3 Political organizations shall not be required to file disclosure reports for reporting periods when no contributions were received and spending was less than twenty dollars ($ 20).

4.20.4 Political organizations shall file all applicable disclosure reports required by *section 1-45-103(14.5), C.R.S.*, with the appropriate filing officer. For the purposes of this rule, the appropriate filing officer shall be the same for political organizations as for political committees as outlined in *section 1-45-109, C.R.S.* [1-45-108.5]

4.21 Disclosure of contributions by Limited Liability Companies (LLCs). [1-45-103.7(5), (6), (7), and (8)]

4.21.1 The written affirmation provided by an LLC in accordance with *section 1-45-103.7, C.R.S.*, shall include the names and addresses of the LLC's members and describe how the contribution is to be attributed to the LLC's members.

4.21.2 The affirmation shall include the occupation and employer of any member to whom a contribution of one hundred dollars ($ 100) or more is attributed.

4.21.3 A committee that receives a contribution from an LLC shall report as separate contributions the amount attributed to each member. For such

contribution, the contributor shall be identified by the name of the member, together with the name of the LLC.

4.21.4 Any contributions received by a committee from an LLC that does not comply with the affirmation requirements set forth in *section 1-45-103.7, C.R.S.*, and this Rule 4.21 shall be returned to the contributor within thirty (30) days.

4.21.5 Notwithstanding the provisions of Rule 4.1, each contribution received from an LLC shall be listed individually on disclosure reports, regardless of the dollar amount. Disclosure shall include the name and address of the LLC.

4.21.6 Pursuant to *section 1-45-103.7(5)(d)(II), C.R.S.*, any contribution from an LLC that is attributed to its individual member(s) shall be subject to the contribution limits established in section 3 of Article XXVIII of the Colorado Constitution, as adjusted by Rule 12, for the LLC and for the individual member(s) that the contribution is attributed to.

4.21.6.1 Notwithstanding the amounts attributed to each individual member of an LLC, no LLC shall be permitted to make a contribution that exceeds the limit for a "person" established in section 3 of Article XXVIII of the Colorado Constitution, as adjusted by Rule 12.

4.22 In accordance with Article XXVIII, sections 2(8), 2(9), and 3(4)(a) of the Colorado Constitution,

corporations or labor organizations shall not make expenditures, including independent expenditures, that expressly advocate the election or defeat of a candidate.

4.23 Redaction of Personal Sensitive Information from Disclosure Reports

4.23.1 Any person who believes their safety or the safety of an immediate family member may be in jeopardy as a result of information disclosed on any campaign finance report filed with the Secretary of State pursuant to Title 1, Article 45, C.R.S., may apply to the Secretary of State to redact sensitive personal information from the online versions of such report(s). The Secretary of State, upon a showing of good cause, may redact the minimum amount of sensitive information necessary to protect the safety of such person or his or her immediate family. If the Secretary of State redacts sensitive information disclosed on a campaign finance report, the original unredacted report shall remain a public record pursuant to Title 24, Article 72, C.R.S.

4.23.2 Applications for redaction of sensitive information shall be submitted in writing and shall include the requestor's name, the identified entry(s) of concern, a justification for the application, and the committee to whom the contribution(s) was made or expenditure(s) received.

**DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO**
Court Address: 1437 Bannock Street
Denver, CO 80202

**Plaintiff:** INDEPENDENCE INSTITUTE, a Colorado non-profit corporation;

v.

**Defendants:** RICHARD EVANS; and GIGI DENNIS, in her official capacity as SECRETARY OF STATE, STATE OF COLORADO.

▲**COURT USE ONLY**▲


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Case Number: **05 CV 7604**

Division: **7**

**AFFIDAVIT OF JON CALDARA IN SUPPORT OF INDEPENDENCE INSTITUTE'S MOTION FOR SUMMARY JUDGMENT**

Jon Caldara, being first duly sworn, testifies as follows:

1. I am a citizen of the United States, a resident of the State of Colorado, and over 18 years of age. I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify thereto if called as a witness at trial.

2. I am the President of the Independence Institute, a Colorado non-profit corporation located in Golden, Colorado. My responsibilities include administration and management, strategic planning, policy work, and fundraising. The Institute has seven full-time and seven part-time employees and a yearly budget or approximately 1.2 million dollars, we rely entirely on private donations to fund our operations.

3. The Independence Institute, which was founded in 1985, is a non-partisan public policy research organization whose purpose is to educate the public about the benefits of the free market and the dangers of expansive government. Toward that end, the Institute provides policy makers, legislators, business leaders, the media, and the citizens of Colorado with educational and analytical material addressing a broad spectrum of policy issues from a free-market, pro-freedom perspective. Attached as

Exhibit 1 is a true and correct copy of the Institute's "About Us" webpage, as of July 7, 2006.

4. The Institute uses a wide variety of media and communications approaches to further its educational mission. For example, the Institute's research fellows, staff, and contributing professors publish detailed "issue papers" and "issue backgrounders" covering a wide variety of topics, and the Institute produces weekly opinion-editorials commenting on current events; the Institute produces *Independent Thinking,* a weekly television interview program on Colorado Public Television, KBDI Channel 12, Institute Research Director Dave Kopel serves as a panelist on the weekly KBDI roundtable public affairs program *Colorado Inside-Out* hosted by Peter Boyles, and I host *The Jon Caldara Show,* a daily talk show on News Radio 850 KOA. Attached to this Affidavit are true and correct copies of archived issue papers (Exhibit 2) and opinion editorial articles (Exhibit 3) as available on the Institute's website as of July 7, 2006. The Institute also sponsors speeches, debates, and symposia, produces broadcast and print advertisements, and hosts outreach events for donors, activists, and other friends of the Institute. Institute speakers and scholars also present legislative briefings and testimony, participate in public forums, and have personal meetings to inform and educate those who make policy in Colorado, from Colorado's elected officials to the citizens of Colorado themselves. Much of the information the Institute produces is available on its website, www.i2i.org. Attached as Exhibit 4 is a

true and correct copy of the Institute's homepage, as of July 7, 2006.

5. The Institute is organized into seven "policy centers," each headed by its own director and supported by one or more policy analysts and research associates. These include (1) the Education Policy Center, addressing school choice, school accountability, and teachers' rights; (2) the Health Care Policy Center, addressing and proposing free-market alternatives to problems with the current health care system; (3) the Second Amendment Project, addressing legal precedents, news, and opinions to provide a constitutional perspective on second amendment topics such as gun control and gun rights; (4) the Center for the American Dream, addressing planning efforts that attempt to engineer lifestyles through subsidies, regulation, and limits on personal and economic freedom; (5) the Campus Accountability Project, which serves as an educational resource on free speech, academic freedom, and racial discrimination in higher education, and as a watchdog to ensure universities observe and protect the individual rights of faculty, staff, and students; (6) the Fiscal Policy Center, working to defend TABOR and to find a balance between taxation and liberty; and (7) the Liberty Project, addressing topics of limited government in public policy. Attached as Exhibit 5 is a true and correct copy of the Institute's webpage, dated July 7, 2006, describing these policy centers.

6. As a general matter, the Institute focuses its educational activities on issues that are of current

importance. We see it as our job to have something to say about important issues within our mission that affect the State of Colorado, so speaking up before an issue is decided, a law is passed, or a policy is set is crucial. As a result, Institute scholars, fellows, and staff are usually very active writing papers and giving briefings and testimony while the state legislature is in session, while agencies are considering new rules or policies, when initiatives or referenda are on the ballot, or simply when an issue is being debated publicly.

7. Because many issues in Colorado are decided through the initiative and referendum process, the Institute often comments on the subjects of ballot initiatives and referenda. In fact, in the eight years I have been with the Institute, I cannot remember an election season when we did not have something to say about at least one ballot initiative or referendum during that season. The amount of time and effort we spend commenting on these subjects varies depending on the importance of the issue and the resources we have on hand. Sometimes the Institute will write op-eds and issue papers, sometimes we will sponsor speaking engagements and debates, sometimes we will purchase print or broadcast advertisements to communicate our views, and sometimes we will do all of these things.

8. However, as a tax-exempt corporation under 26 U.S.C. § 501(c)(3), the Independence Institute does not become involved in party politics, political campaigns or elections of any type. We do not endorse or

campaign for candidates, ballot initiatives or referenda, and we do not engage in lobbying. In our public commentary on issues related to elections, we do not tell people to vote for or against any candidate or issue.

9. In the spring of 2005, the Colorado legislature referred two tax and finance measures to the November ballot. Known as Referenda C & D, the measures were designed to permit the State to keep tax revenues that otherwise would be refunded to citizens under the Taxpayer's Bill of Rights (TABOR) – Colorado's revenue and expenditure limitation amendment – and to allow the State to issue bonds for certain projects.

10. In the Institute's view, the referenda were unnecessary and would greatly weaken TABOR and lead to higher taxes and more government spending. Accordingly, soon after the legislature referred the measures, we set out to educate the public about the benefits of TABOR and the impact of the referenda on taxes and government spending. The Institute published issue papers and op-eds about the referenda and the issues they raised, we provided Institute policy analysts for debates and speaking engagements about the referenda, and we collected a wide variety of information, both for and against the referenda, and made it available on a website, www.taxincrease.org, that we had created several years ago for our Fiscal Policy Center. Attached as Exhibit 6 is a true and correct copy of the www.taxincrease.org homepage, as of July 7, 2006.

11. Taxincrease.org includes the texts of Referenda C and D and TABOR, analyses, articles, and information about all three, and the state budget and appropriations report for 2005. It also includes links to groups that were critical of Referenda C, such as the Heritage Foundation and the Cato Institute, and groups that supported it, such as the Bell Policy Center, as well as links to registered issue committees on both sides of the issue. In addition to this information about the referenda, our main website, www.i2i.org, features a great deal of information about TABOR and general tax and finance matters.

12. As part of our educational efforts, several months before the November 2005 election, the Institute released four radio advertisements to educate listeners about Referendum C. The advertisements identified Referendum C, provided summary information on the scope of its tax implications, and summarized long-standing Institute positions on fiscal restraint and tax reduction. The advertisements directed listeners to taxincrease.org to learn more about Referendum C. They did not ask listeners to vote yes or no on the referendum.

13. The total value of our educational efforts in connection with the referenda exceeded $200.

14. In August 2005, Richard Evans filed a complaint against the Institute with the Colorado Secretary of State. The complaint alleged that the Institute was an "issue committee" because of its educational activities in connection with Referenda C

and D, and that it violated the State's Fair Campaign Practices Act by failing to register as such and failing to make required disclosures. Mr. Evans's complaint also alleged that the Institute made contributions to a registered issue committee, Vote No; It's Your Dough ("Vote No"), that were not reported in Vote No's disclosures with the Secretary of State.

15. The Vote No issue committee was a registered issue committee that I chaired and volunteered for in my personal capacity and on my own time. I have been politically active in Colorado for many years and was before I became the President of the Independence Institute. I have campaigned for and against ballot initiatives and referenda in the past, and I decided to chair the Vote No issue committee because I personally opposed Referendum C. However, the Vote No issue committee and my activities in connection with it were entirely separate from the Independence Institute and my job as its President. While I did field a few phone calls, send a few faxes, and make a few copies for the Vote No issue committee while in my office at the Independence Institute, all of these de minimis contributions were reported in Vote No's disclosures to the Secretary of State.

16. As a result of Mr. Evans's complaint, the Independence Institute was forced to hire lawyers and defend itself in the ensuing administrative proceeding. The Institute's lawyers conducted and responded to discovery, defended me and one other Institute employee in depositions, conducted briefing,

and represented the Institute in a hearing on the matter. The Institute spent upwards of $50,000 on legal fees and costs defending itself against this complaint.

17. The Institute was ultimately successful in the action, with the administrative law judge concluding that the Institute's activities in connection with the referenda did not rise to the level of a "major purpose" of the Institute. The judge also concluded that the Independence Institute and the Vote No issue committee were separate entities and that the Institute had not made anything more than de minimis contributions to Vote No that were properly reported to the Secretary of State.

18. However, Mr. Evans's complaint and the ensuing proceeding took a significant toll on the Independence Institute. I and one other Institute employee were deposed in the case and I spent substantial time on issues related to it, including attending and testifying at an all day hearing. Other Institute employees were concerned that they would be subpoenaed to produce documents and testify. As a relatively small and sometimes struggling organization, we can ill afford the time and expense it took to defend ourselves, and doing so diverted resources from our other educational and communications activities.

19. The complaint and ensuing proceeding also harmed the Institute's reputation by conveying the impression that we had violated the law or done

something unseemly. For instance, we were accused in press reports of "running a campaign" without reporting contributors, "laundering" money, and secretly funding "sleaze." Attached as Exhibit 7 are true and correct copies of some of these press reports, as printed from LexisNexis or NewsLibrary. This made it more difficult to raise the funds we rely on to operate because some potential donors did not want to contribute to an organization that was accused of violating the law.

20. In addition, because the administrative law judge's decision did not come out until after the November 2005 election, from the time that the complaint was filed in August through the election, we did not know whether our commentary about the referenda violated the law by not being reported as "expenditures" and whether we were risking fines by continuing to speak. On more than one occasion, I thought twice about whether the Institute should continue to speak out about the referenda.

21. The Institute does not track its expenditures or the time spent on communications or educational activities according to whether they have something to do with a ballot initiative or referendum. With our small staff, it would be very difficult to track such expenditures and time if we were considered an "issue committee," and doing so would divert resources from other educational and communications activities.

22. Some of our donors restrict the use of the funds they donate to the Institute to particular policy areas, but most do not. As a result, most of our donations are commingled together in a general account and used to pay our general expenses. Thus, if we were found to have "evolved" into an issue committee at some point, there is simply no way we could disclose the identities of only those contributors whose funds went to pay for educational activities in connection with ballot initiatives.

23. The Institute places an extremely high value on donor privacy. Many donors only give money to us because they know how serious we are about maintaining their privacy. The Institute often takes controversial positions on issues ranging from school vouchers, teachers unions, and racial preferences, to gun control and crime, to taxation and privatizing government services, to term limits. As a result, many of our donors want their support for the Institute to remain confidential. For example, some of our donors are public school teachers who might be criticized or harassed by unions, coworkers, and other opponents of school choice if their support were made public. Similarly, some of our donors are government employees who might be criticized by their employers or coworkers if their support for an organization that opposes tax increases and supports privatization were disclosed.

24. The Institute was not formed for the specific purpose of commenting on or supporting or opposing any ballot issue, and, to my knowledge, none of our

donors consider the Institute to be an issue committee that has to disclose donors' identities. If we were forced to disclose the identities of our donors, many of them would stop supporting the Institute.

Dated: July 12, 2006

/s/ Jon Caldara
Jon Caldara

COUNTY OF JEFFERSON )
) ss.
STATE OF COLORADO )

Subscribed and sworn to before me this 13 day of July, 2006.

/s/ Kathryn J. Cullar
Notary Public

My commission expires: March 5, 2007

**DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO**
Court Address: 1437 Bannock Street
Denver, CO 80202

**Plaintiff:** INDEPENDENCE INSTITUTE, a Colorado non-profit corporation;

v.

**Defendants:** RICHARD EVANS; and GIGI DENNIS, in her official capacity as SECRETARY OF STATE, STATE OF COLORADO.

▲**COURT USE ONLY**▲


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Case Number: **05 CV 7604**

Division: **7**

## AFFIDAVIT OF JULIE REISKIN

Julie Reiskin, being first duly sworn, testifies as follows:

1. I am a citizen of the United States, a resident of the State of Colorado, and over 18 years of age. I make this affidavit based on my personal knowledge of the facts set forth and am competent to testify if called as a witness at trial.

2. I am the Executive Director of the Colorado Cross-Disability Coalition ("CCDC"), a Colorado nonprofit corporation which was founded in 1990. CCDC is tax exempt under 26 U.S.C. § 501(c)(3). We survive on donations received from individuals, corporations, foundations, and money we earn from activities such as training and consulting.

3. CCDC advocates for basic civil and human rights for people with disabilities in Colorado. Our overall purpose is to promote the idea that people with disabilities have the right to fully participate in their communities.

4. CCDC pursues its mission through a series of activities including advocating on behalf of disabled individuals before state and local agencies, lobbying elected representatives for legislative change, filing civil rights lawsuits on behalf of disabled individuals, providing information to members and the public about laws and policies that affect the rights of disabled individuals, and training grass roots

organizations and others on effective advocacy for the rights of the disabled.

5. Individuals can become members of CCDC by signing up on our website (www.ccdconline.org) or by submitting a paper membership application and giving us their name and contact information and affirming that they support our mission. Donations are not required for individuals to become CCDC members, but they can become members by donating as well. Organizations can become members only by donating, and may do so at differing levels.

6. CCDC often provides analyses and commentary to its members and the public about laws and policies that affect the rights of the disabled, including laws pending before the legislature and ballot initiatives and referenda. CCDC communicates with its members and the public through email alerts, press releases, its newsletter, its website, and group activities such as training seminars.

7. CCDC often provides analysis and commentary about ballot initiatives that affect the rights of the disabled in Colorado. Often we will publish our views and analyses on ballot initiatives in our newsletter, on our website, and in news outlets if possible; sometimes we will provide volunteers for campaigns and rallies; and we provide speakers and will act as a press contact for commentary on ballot initiatives.

8. During the November 2005 election cycle, CCDC supported the passage of Referendum C. We

felt that the referendum was necessary to ensure that state funds would be available for programs for the disabled. Our activities in connection with Referendum C included providing analyses and commentary on our website and in our newsletter, communicating to our members and grass roots affiliates throughout Colorado about the referendum and its impact on the rights of the disabled, and providing people to show up at rallies and press events and encouraging our membership to show up at Pro Referendum C events in their local communities. Although we did not keep track of the amount of time and money we spent on these activities, I believe the value of these resources would exceed $200.

9. CCDC is not a registered issue committee under Colorado law and we have never established a registered issue committee.

10. CCDC is a small organization that operates on a very tight budget. We have eight paid employees and a number of volunteers. Tracking and reporting all of our expenditures in connection with a ballot initiative would be an enormous burden on CCDC that would cause us to curtail some of our other advocacy and educational activities. Only I and the operations manager at CCDC would be available to do this work, and we are already stretched thin with our other duties. In fact, we do not even have the infrastructure to apply for grants that require detailed reports and proposals. Most of our time goes to advocating for the disabled; if we were required to

comply with tracking and reporting requirements, we would have to choose between commenting on ballot initiatives and our other advocacy activities. Simply put, tracking and reporting all of our expenditures in connection with ballot initiatives would be a nightmare.

11. CCDC places a high value on donor confidentiality. Many donors to CCDC, especially our organizational donors, are concerned about disclosing their support because CCDC is often highly critical of state and local agencies and health care providers and programs because we believe they do not adequately serve the disabled. Many of our organizational donors must work with these agencies and health care providers and are concerned that their support for CCDC will damage their relationships with these agencies and providers. If CCDC were forced to disclose the identities of its donors, some would withdraw their support for the organization.

Dated: July 6, 2006

/s/ Julie Reiskin
Julie Reiskin

CITY AND COUNTY OF DENVER )
) ss.
STATE OF COLORADO )

Subscribed and sworn to before me this 6th day of July, 2006.

/s/ Andrew Montoya
Notary Public

My commission expires: 04/05/2008

**Session Laws of Colorado 2009**
**First Regular Session, 67th General Assembly**

CHAPTER 174

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## ELECTIONS

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### HOUSE BILL 09-1153

BY REPRESENTATIVE(S) May, Court, Gardner B., Kerr J, Labuda, Lambert, Looper, Murray, Nikkei, Stephens, Waller, Gerou; also SENATOR(S) Harvey.

AN ACT

**CONCERNING THE REQUIREMENTS APPLICABLE TO THE FORMATION OF AN ISSUE COMMITTEE UNDER COLORADO LAW GOVERNING CAMPAIGN FINANCE.**

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** 1-45-103, Colorado Revised Statutes, is amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS to read:

**1-45-103. Definitions.** As used in this article, unless the context otherwise requires:

(1.3) "BALLOT ISSUE" SHALL HAVE THE SAME MEANING AS SET FORTH IN SECTION 1-1-104 (2.3); EXCEPT THAT, FOR PURPOSES OF SECTION 1-45-117, "BALLOT

ISSUE" SHALL MEAN BOTH A BALLOT ISSUE AS DEFINED IN THIS SUBSECTION (1.3) AND A BALLOT QUESTION.

(1.5) "BALLOT QUESTION" SHALL HAVE THE SAME MEANING AS SET FORTH IN SECTION 1-1-104 (2.7).

**SECTION 2.** The introductory portion to 1-45-108 (3) and 1-45-108 (3) (f), Colorado Revised Statutes, are amended, and the said 1-45-108 is further amended BY THE ADDITION OF THE FOLLOWING NEW SUBSECTIONS, to read:

**1-45-108. Disclosure.** (3) Except as otherwise provided in subsection (3.5) of this section, all candidate committees, political committees, ~~issue committees~~, small donor committees, and political parties shall register with the appropriate officer before accepting or making any contributions, Registration shall include a statement listing:

(f) Any intent of the candidate committee, political committee, ~~issue committee~~, small donor committee, or political party to electronically file reports required by this article that may be filed electronically on a web site operated and maintained by the secretary of state pursuant to section 1-45-109.

(3.3) SUBJECT TO THE PROVISIONS OF SUBSECTION (7) OF THIS SECTION, EACH ISSUE COMMITTEE SHALL REGISTER WITH THE APPROPRIATE OFFICER WITHIN TEN CALENDAR DAYS OF ACCEPTING OR MAKING CONTRIBUTIONS OR EXPENDITURES IN EXCESS OF TWO HUNDRED DOLLARS TO SUPPORT OR OPPOSE ANY BALLOT ISSUE OR BALLOT QUESTION. IF REQUIRED TO REGISTER UNDER

THE REQUIREMENTS OF THIS SUBSECTION (3.3), THE REGISTRATION OF THE ISSUE COMMITTEE SHALL INCLUDE A STATEMENT CONTAINING THE ITEMS LISTED IN PARAGRAPHS (A) TO (F) OF SUBSECTION (3) OF THIS SECTION IN CONNECTION WITH OTHER COMMITTEES AND A POLITICAL PARTY.

(7)(a) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, AND SUBJECT TO THE PROVISIONS OF PARAGRAPH (B) OF THIS SUBSECTION (7), A MATTER SHALL BE CONSIDERED TO BE A BALLOT ISSUE OR BALLOT QUESTION FOR THE PURPOSE OF DETERMINING WHETHER AN ISSUE COMMITTEE HAS BEEN FORMALLY ESTABLISHED, THEREBY NECESSITATING COMPLIANCE WITH ANY DISCLOSURE AND REPORTING REQUIREMENTS OF THIS ARTICLE AND ARTICLE XXVIII OF THE STATE CONSTITUTION, AT THE EARLIEST OF THE FOLLOWING;

(I) A TITLE FOR THE MATTER HAS BEEN DESIGNATED AND FIXED IN ACCORDANCE WITH LAW;

(II) THE MATTER HAS BEEN REFERRED TO THE VOTERS BY THE GENERAL ASSEMBLY OR THE GOVERNING BODY OF ANY POLITICAL SUBDIVISION OF THE STATE WITH AUTHORIZATION TO REFER MATTERS TO THE VOTERS;

(III) IN THE CASE OF A CITIZEN REFERENDUM PETITION, THE MATTER HAS BEEN SUBMITTED FOR FORMAT APPROVAL IN ACCORDANCE WITH LAW;

(IV) A PETITION CONCERNING THE MATTER HAS BEEN CIRCULATED AND SIGNED BY AT LEAST ONE PERSON; EXCEPT THAT, WHERE A MATTER BECOMES A BALLOT ISSUE OR BALLOT QUESTION UPON SUCH SIGNING, ANY PERSON

OPPOSING THE MATTER SHALL NOT BE CONSIDERED TO BE AN ISSUE COMMITTEE FOR PURPOSES OF THIS ARTICLE AND ARTICLE XXVIII OF THE STATE CONSTITUTION UNTIL ONE SUCH PERSON KNOWS OR HAS REASON TO KNOW OF THE CIRCULATION; OR

(V) A SIGNED PETITION HAS BEEN SUBMITTED TO THE APPROPRIATE OFFICER IN ACCORDANCE WITH LAW.

(b) NOTWITHSTANDING THE PROVISIONS OF PARAGRAPH (A) OF THIS SUBSECTION (7), WHERE A MATTER CONCERNS A MUNICIPAL ANNEXATION BROUGHT PURSUANT TO ARTICLE 12 OF TITLE 31, C.R.S., THE MATTER SHALL NOT BE CONSIDERED TO BE A BALLOT ISSUE OR BALLOT QUESTION FOR THE PURPOSE OF DETERMINING WHETHER AN ISSUE COMMITTEE HAS BEEN FORMALLY ESTABLISHED, THEREBY NECESSITATING COMPLIANCE WITH ANY DISCLOSURE AND REPORTING REQUIREMENTS OF THIS ARTICLE AND ARTICLE XXVIII OF THE STATE CONSTITUTION, UNLESS AND UNTIL THE FIRST NOTICE OF THE ANNEXATION ELECTION HAS BEEN PUBLISHED IN ACCORDANCE WITH THE REQUIREMENTS OF SECTION 31-12-112(6), C.R.S.

**SECTION 3.** 31-12-112 (6), Colorado Revised Statutes, is amended to read:

**31-12-112. Election – annexation pursuant to election.** (6) Notice of such election shall be given by publication once a week for four weeks in some newspaper of general circulation in the area and published in the county in which such area is located or, if there is no such newspaper in the county, in some newspaper of general circulation published in an adjacent county. Additional notice shall be given

by posting a notice at each polling place. The said posting and first newspaper publication shall be not less than four weeks preceding such election. Such notice shall specify the time and place of such election, shall contain a description of the boundaries of the area proposed to be annexed, and shall state that a map or plat thereof is on file in the office of the clerk of the district court in which such area, or a part thereof, is located. ~~and it~~ SUCH NOTICE shall ALSO set forth the conditions and requirements proposed by the governing body for annexation of the area, AND IT SHALL INFORM THE PUBLIC THAT AN ISSUE COMMITTEE IS REQUIRED BY LAW TO REGISTER WITH THE APPROPRIATE OFFICER PURSUANT TO SECTION 1-45-108, C.R.S., WITHIN TEN CALENDAR DAYS OF ACCEPTING OR MAKING CONTRIBUTIONS OR EXPENDITURES IN EXCESS OF TWO HUNDRED DOLLARS TO SUPPORT OR OPPOSE THE ANNEXATION QUESTION.

**SECTION 4. Act subject to petition – effective date.** (1) This act shall take effect September 1, 2009.

(2) However, if a referendum petition is filed against this act or an item, section, or part of this act during the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, then the act, item, section, or part, shall not take effect unless approved by the people at a biennial regular general election and shall take effect on the date specified in subsection (1) or on the date of the official declaration

of the vote thereon by proclamation of the governor, whichever is later.

Approved: April 22, 2009

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*Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.*

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(3)

NO. 09-265

Supreme Court, U.S.
FILED
OCT 16 2009
OFFICE OF THE CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**

INDEPENDENCE INSTITUTE,
*Petitioner,*

v.

BERNIE BUESCHER, SECRETARY OF STATE,
STATE OF COLORADO,
*Respondent.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS*

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Colorado may, consistent with the First Amendment, require the disclosure of certain financial contributions and expenditures for "issue committees," *i.e.*, groups that have "a major purpose of supporting or opposing" a ballot measure and that collect or spend at least $200 toward such ballot issue election activity.

2. Whether Colorado's disclosure requirements for "issue committees" comport with this Court's decision in *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), where such reporting is limited to after-the-fact disclosure of certain financial contributions and expenditures made to support or oppose a specific ballot measure.

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## INTRODUCTION

This action concerns purely facial constitutional challenges to the definition of "issue committee" under Colorado campaign finance law and the corresponding registration and disclosure requirements for such committees. Under Colorado law, an "issue committee" is a group of two or more persons that has a major purpose of supporting or opposing a ballot measure and that has made or accepted contributions or expenditures of at least $200 to support or oppose a ballot measure.

Petitioner, the Independence Institute, is a non-profit 501(c)(3) policy research organization whose purpose is "to educate the public about the benefits of the free market and the dangers of expansive government." In 2005, the Institute conducted a widespread public educational campaign on Referenda C and D, two tax and financing referenda that appeared on the Colorado statewide ballot. It published issue papers and opinon editorials about the referenda, provided policy analysts for debates about the referenda, collected a variety of information for and against the referenda for its website, and aired three radio advertisements concerning the measures, for which it spent $35,000 of its own funds and received $200,000 through in-kind contributions.

The Institute contends that Colorado's definition of "issue committee" is facially unconstitutionally vague and overbroad. However, an administrative law judge had little difficulty concluding that

Colorado's definition did *not* apply to the Institute because it did not have "a major purpose" to support or oppose Referenda C and D. Thus, like myriad other voices that contributed to the public debate on these referenda, the Institute engaged in a wide range of speech activity free from regulation. The Institute was not required to register as an issue committee; it did not have to file any contribution or expenditure reports; and it was never required to reveal the identity of a single donor. In short, the provisions challenged here were readily (and narrowly) construed to exempt the Institute from regulation.

## STATEMENT

1. In 2002, Colorado voters passed Amendment 27, [1] which modified and placed portions of Colorado campaign finance law in the state constitution. Colo. Const. art. XXVIII; App. 99. Under Article XXVIII, § 2(10)(a), an "issue committee" is a group of two or more persons that "has a major purpose of supporting or opposing any ballot issue or ballot question." To be an issue committee, the group must accept or make contributions of $200 or more to support or oppose a ballot measure. *Id.* Issue committees are not subject to contribution limits or restrictions on the sources of contributions. The regulation of such groups is limited to the reporting of contributions and expenditures.

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[1] Petitioners' amici state incorrectly that "*legislators* amended the state constitution." *See* Br. of Amici Curiae in Support of Pet'r ("Br. of Amici") at 5 (emphasis added). Article XXVIII was a citizen-initiated amendment.

Colorado's Fair Campaign Practices Act (FCPA), Colo. Rev. Stat. §§ 1-45-101 to -118 (2009) sets forth the relevant registration and reporting requirements for issue committees. Issue committees must register within ten days of accepting or making contributions in excess of $200 to support or oppose a ballot measure. Colo. Rev. Stat. § 1-45-108(3.3). App. 182-83. Registration statements must provide the name of the organization; a registered agent; a street address and telephone number for the principal place of operations; all affiliated candidates and committees; and the purpose or nature of the committee's interest. Colo. Rev. Stat. § 1-45-108(3). App. 131-32. Issue committees must file periodic reports that include all contributions and expenditures, including the name and address of persons who contribute $20 or more, and the occupation and employer of persons who make one-time (as opposed to aggregate) contributions of $100 or more. Colo. Rev. Stat. §§ 1-45-108(1)(a)(I)-(II), -108(2)(a); *see also* Colo. Const. art. XXVIII, § 2(5) (defining "contributions"); *id.* § 2(8) (defining "expenditures"); 8 Colo. Code Regs. § 1505-6 (1.3) (clarifying "contributions"); *id.* § 1505-6 (4.9.1) (clarifying disclosure of occupation and employer). App. 101-02, 104-05, 127-31, 142-43, 153-54.

The Secretary has rulemaking authority under both Article XXVIII and the FCPA. *See* Colo. Const. art. XXVIII, § 9(1)(b); Colo. Rev. Stat. § 1-45-111.5(1). App. 120, 140. The Secretary has promulgated several rules concerning issue committees as part of the Secretary's Rules Concerning Campaign and Political Finance. *See, e.g.*, 8 Colo. Code Regs. § 1505-6 (Rules 1.6, 1.7, 3.8,

4.15). App. 143-44, 148, 157-58.[2] Under Rule 1.7, a group will not be deemed an "issue committee" unless it both "has a major purpose of supporting or opposing any ballot issue or ballot question" *and* it "has accepted or made contributions or expenditures in excess of two hundred dollars to support or oppose any ballot issue or ballot question." 8 Colo. Code Regs. § 1505-6 (1.7). App. 144. In addition, Rule 4.15 provides that a "multi-purpose issue committee" (an issue committee whose purposes are not limited exclusively to supporting or opposing ballot issues) need report *only* ballot issue campaign related activities, *i.e.*, contributions and expenditures accepted or made for the purpose of supporting or opposing ballot issues or questions. 8 Colo. Code Regs. § 1505-6 (4.15).[3] App. 157.

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[2] On September 17, 2009, the Secretary issued a Notice of Adoption amending several campaign finance rules. These amendments do not affect the issues in this litigation, although the Secretary notes that Rule 1.6 has been repealed in light of House Bill 09-1153, which, *inter alia*, codified the definition of an "issue" in statute. App. 181. The Notice appears at: .

[3] The Institute describes the Secretary's multi-purpose issue committee rules as "last-minute." Pet. at 20 n.9. However, as set forth in the Secretary's trial court briefs, which are part of the record below, the concept of a "multi-purpose issue committee" and the tailored reporting for such committees predates the passage of Article XXVIII; Rule 4.15 simply codified the Secretary's documented interpretation and practice since 2000. Sec'y Br. in Support of Summ. J. at 6-8, 19-20; Sec'y Combined Resp. and Reply Br. at 13, Exs. 2, 4, 9. Neither the Institute nor any other party challenged any aspect of the multi-purpose issue committee rules at the formal rulemaking hearing in October 2006. The Secretary adopted the rules on a permanent basis, effective December 4, 2006.

2. Petitioner, the Independence Institute, is a non-profit policy research organization founded in 1985 whose purpose is "to educate the public about the benefits of the free market and the dangers of expansive government." App. 2, 164. John Caldara is the Institute's President. App. 164. As a tax-exempt organization under 26 U.S.C. § 501(c)(3), the Independence Institute does not become involved in political campaigns or elections of any type; it does not endorse or campaign for ballot initiatives or referenda; and it does not engage in lobbying. App. 167-68. In its public commentary on issues related to elections, the Institute does not tell people to vote for or against any candidate or issue. *Id.*

In 2005, the Institute conducted a widespread educational campaign regarding the possible negative impact of Referenda C and D, two tax and financing measures that appeared on the Colorado statewide ballot. App. 168. The Institute published issue papers and opinion editorials about the referenda, provided policy analysts for debates and speaking engagements about the referenda, and collected a variety of information for and against the referenda for its website. *Id.* It also aired three radio advertisements that provided information on the tax implications of Referendum C and directed listeners to a website to learn more information. The ads did not explicitly urge listeners to vote yes or no on the referendum. App. 3, 169.[4] For these radio ads, the Institute spent over $35,000 of its own funds and received approximately $200,000 through in-kind contributions from an undisclosed donor. App. 55,

[4] The text of these radio ads appears at App. 53-57.

58. Colorado voters approved Referendum C but not Referendum D. App. 3.

Mr. Caldara served as the spokesman for the Institute on Referenda C and D. App. 53. Mr. Caldera has campaigned for and against ballot initiatives in the past, and he personally opposed Referendum C. App. 170. However, because the Institute's mission is to educate, not advocate, Mr. Caldara personally established and chaired an issue committee called "Vote No, It's Your Dough" as a vehicle to expressly advocate the defeat of the measures. App. 60, 170.

3. In August 2005, Richard Evans (an agent of an issue committee in favor of the referenda) filed a campaign finance complaint with the Secretary,[5] alleging that the Institute was an "issue committee" because it had engaged in efforts to oppose Referenda C and D, including paying for and airing the radio ads. App. 3. Evans claimed that the Institute had failed to register as an issue committee, open a separate bank account for its campaign activities, and disclose its contributions and expenditures.[6] *Id.* The Secretary referred the complaint to the Colorado Office of Administrative

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[5] In 2005, Gigi Dennis was the Colorado Secretary of State. Mike Coffman succeeded Ms. Dennis on January 9, 2007; Respondent Bernie Buescher succeeded Mr. Coffman on January 14, 2009. This brief will simply refer to "the Secretary," regardless of who occupied the position at the time.

[6] Evans also claimed (unsuccessfully) that Mr. Caldara's issue committee, "Vote No, It's Your Dough," violated campaign finance law by failing to report all contributions it had received from the Institute. App. 77-80.

Courts, as required by Colo. Const. art. XXVIII, § 9(2)(a). *Id.*

While the administrative proceedings were pending, the Institute filed this lawsuit against the Secretary, raising constitutional challenges to the definition of "issue committee" in Article XXVIII and the corresponding registration and disclosure requirements for issue committees under the FCPA. The Institute alleged that the definition of issue committee is unconstitutionally vague and overbroad, and that the disclosure requirements for issue committees violate both free expression and association and the right to anonymous speech. The Institute sought to enjoin the administrative proceeding on grounds that the district court should resolve the constitutional challenges first. The court denied the Institute's motion for preliminary injunction. App. 94.

The administrative hearing went forward, and the administrative law judge ("ALJ") issued a decision in November 2005 concluding that the Institute was *not* an issue committee. App. 72, 81. The ALJ considered several factors, including the length of time the Institute had been in existence, the purpose for which it was established, the various issues it had been involved in, its organizational structure, and the amount spent by the Institute on the three radio ads as a proportion of its annual budget. App. 17, 65-72. In view of these factors, the ALJ concluded that Referenda C and D were "not a major purpose or focus of the Institute." App. 58-59. Accordingly, the ALJ held that the Institute was not an issue committee, and therefore had not violated the

registration or disclosure provisions in Article XXVIII or the FCPA. App. 4, 72.

4. Despite this favorable ruling, the Institute continued to pursue its claims in this case. In an order dated December 14, 2005, the district court granted the Secretary's motion to dismiss the complaint to the extent it asserted any as-applied challenges. App. 40. In so doing, the trial court stated that its determination in this suit would be "limited to [Plaintiff's] facial challenges and shall not extend to any as-applied challenges." *Id.* The Institute never contested this ruling.[7] In May 2007, the district court granted summary judgment on all claims in favor of the Secretary. App. 33-39. The district court observed that it was "apparent from the ALJ's ruling that discerning a group's 'major purpose' did not prove overly difficult." App. 35.

5. In November 2008, the Court of Appeals affirmed the trial court's judgment. It held that the definition of "issue committee" in Article XXVIII, §

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[7] Despite the December 14 order, the Institute later attempted to argue in the district court that the registration and disclosure requirements were unconstitutionally burdensome because they "disproportionately impact small educational groups and issue advocacy organizations." App. 21, 22. The district court concluded that the Institute lacked standing to bring this "as-applied" claim. App. 37-38. In the Court of Appeals, the Institute abandoned its "disproportionate impact" argument and revised its burdensomeness claim yet again, contending that the requirements are "unconstitutional as-applied to multi-purpose issue committees." App. 22-23. The Court of Appeals held that this claim was barred by the district court's December 14 order. App. 23. The Institute does not seek certiorari review on this claim.

2(10)(a) is neither facially vague nor overbroad. App. 10-20. It further held that the FCPA disclosure requirements do not violate the right to engage in anonymous speech and association. *Id.* 23-28.

In a special concurrence, Judge Connelly observed that the phrase "a major purpose" easily withstands a facial challenge without any narrowing construction beyond what the Secretary has already provided. App. 29-30 (Connelly, J., specially concurring). Similarly, he observed that the Secretary's *administrative regulations* (not judicial construction) have obviated any overbreadth concern by requiring "multi-purpose issue committees" to report only ballot-specific contributions and expenditures. *Id.*

## REASONS FOR DENYING THE PETITION

This case does not warrant the Court's exercise of its certiorari jurisdiction. *First*, this case presents no justiciable case or controversy between the Institute and the Secretary. The Independence Institute brings purely facial constitutional challenges to Colorado's campaign finance provisions governing issue committees, yet it is undisputed here that the Independence Institute is *not* an issue committee under Colorado law. All sides agree that the Institute's activities do not require it to register or report as an "issue committee." The Institute is therefore unaffected by the registration and disclosure provisions it challenges here as facially unconstitutional. The record before the Court reflects that in practice, these provisions do not apply to policy groups like the Institute, and thus cannot

infringe their rights. Any dispute between the Institute and the State is therefore, at best, hypothetical. The lack of a concrete legal dispute, combined with the fact that no record was developed below on what is a significantly revised overbreadth claim on appeal, render this case a poor vehicle to address the substantive questions presented.

*Second,* even if it were properly presented, the alleged conflict between the Colorado intermediate appellate state court ruling here and the split panel decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) does not warrant this Court's review. The Colorado provisions challenged here are distinguishable from North Carolina's regulatory scheme. In particular, Colorado law, as narrowly construed by lower Colorado courts and the Secretary's administrative regulations, require multi-purpose issue committees to disclose only contributions and expenditures that are unambiguously related to ballot issue campaigns. Moreover, the Colorado Supreme Court has not yet had an opportunity to issue any final word interpreting the scope of the challenged provisions as a matter of state law, let alone weigh in on their federal constitutionality. The Colorado Supreme Court may well choose to do so in a future case that, unlike this one, presents an actual controversy.

*Finally*, the Colorado Court of Appeals properly rejected the Institute's facial constitutional challenges, leaving open the opportunity for a true multi-purpose issue committee (that is, a group actually subject to the challenged provisions) to bring a future as-applied challenge in a proper case.

The Court of Appeals' ruling is consistent with the First Amendment and represents a straightforward application of this Court's prior decisions. Contrary to the Institute's contention, Colorado does not attempt to regulate groups that merely "speak out" on ballot measures, or even groups that only "occasionally engage in ballot measure advocacy." Pet. 3, 5. As the Institute's own case demonstrates, Colorado law provides ample protection to the freedom of speech and association.

## I. There is no justiciable controversy between the Institute and the Secretary warranting review of the questions presented.

The Institute brings strictly facial challenges to Colorado's campaign finance provisions; consequently, it faces a "heavy burden" in advancing its claims. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 207 (2003).

This Court has observed that facial challenges are "disfavored," noting that "[c]laims of facial invalidity often rest on speculation" and " raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008) (internal quotations omitted). "Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law

broader than is required by the precise facts to which it is to be applied." *Id.* (internal quotations omitted).

In a facial challenge, the State often has had no opportunity to implement the challenged law; its courts have had no occasion to construe it in the context of actual disputes, or to accord it a limiting construction to avoid constitutional questions. *See id.* at 1190. This case is not a pre-enforcement facial challenge in which a litigant alleges a fear that the law may be enforced against him. Here, although a complaint actually was brought against the Institute, the Institute has already *won*. The provisions challenged here have been held conclusively *not* to apply to this Petitioner.

### A. The Institute is unaffected by the campaign finance provisions it challenges here.

It is undisputed that the Institute is not an issue committee and is not subject to the registration and reporting provisions it challenges here as facially unconstitutional. Not only did the Institute prevail in the underlying administrative proceedings, but the undisputed record establishes that – unless it fundamentally changes its mission and operations – the Institute would *never* meet the Colorado definition of an issue committee because its activities are strictly educational. The Institute does not become involved in political campaigns or elections of any type; it does not endorse or campaign for ballot initiatives or referenda; and it does not advocate a yes or no vote on ballot issues – and in fact, to do so would jeopardize its status as a tax-exempt

organization under 26 U.S.C. § 501(c)(3). App. 167-68. Thus, the Institute cannot meet the definition of an issue committee because, regardless of the organization's purposes, the Institute does not actually "support or oppose" any ballot issue.

The Institute nevertheless remains free to "speak out" about ballot issues, as it regularly does through issue papers and op-eds it authors; the policy analysts it provides for speaking engagements; the debates and symposia it sponsors; the information it collects for its website; and even the broadcast and print ads it issues, such as the radio ads it aired during its education campaign on Referenda C and D. App. 165-69. It may even spend significant sums of money on such efforts – all without having to register as an issue committee or disclose any donor.

This case therefore presents no concrete dispute (or even an imminent future dispute) between this Petitioner and the Secretary warranting this Court's review of the substantive questions presented. Unless the Institute radically changes its activities or operations – and it has given no indication of any plans to do so, nor could it without apparently jeopardizing its 501(c)(3) status – it is free to continue its educational activities without being subject to regulation as an issue committee. In light of the resolution of the underlying administrative proceedings and the state courts' narrow construction of Colorado campaign finance law, the Institute no longer can allege an "actual and well-founded fear that the law will be enforced against" it. *Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). Any threat to the Institute

purportedly latent in the mere existence of these provisions does not exist, where, as here, these provisions "clearly fail[] to cover [its] conduct." *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003).

"[E]ven where allegations of unconstitutionality on the face of a regulation are made, a concrete factual dispute is required to make the case justiciable." *Nat'l Treasury Employees Union v. Kurtz*, 600 F.2d 984, 988 (D.C. Cir. 1979); *see also Wisconsin Right to Life, Inc. v. Paradise*, 138 F.3d 1183, 1186 (7th Cir. 1998) ("A litigant cannot create a case or controversy just by making an untenable 'facial' attack on a statute; actual injury and redressability are essential no matter how the challenge is cast"), *cert. denied*, 525 U.S. 873 (1998). The Institute asks this Court to intervene to resolve what, on this record, is no more than a theoretical or ideological controversy, and which would require this Court to rely wholly on speculation and hypothetical situations not before the Court. Even if it wished to resolve the questions put forth in the Petition, the Court should wait for a case presenting a justiciable controversy brought by plaintiffs who can allege injuries that would be actually redressed if they succeed. This is not such a case.

### B. The record here permits no meaningful evaluation of the Institute's significantly revised claims of overbreadth.

When this litigation began, the Institute's claim of facial overbreadth centered on the Colorado Supreme Court's opinion in *Common Sense Alliance v.*

*Davidson*, 995 P.2d 748 (Colo. 2000). There, the Colorado Supreme Court examined the definition of "issue committee" under a prior version of the FCPA. The court expressed concern that if the definition were construed to encompass groups not *originally* formed "for the purpose of" supporting or opposing a ballot measure, the designation as an "issue committee" would trigger the FCPA reporting requirements and force disclosure of *all* contributors to a committee, including those who had no opportunity to choose whether to contribute to an organization required to make public disclosures. *Id.* at 756.

In view of *Common Sense Alliance*, the Institute alleged in their complaint that the current definition of "issue committee" is unconstitutionally overbroad because any organization that falls within the definition must disclose *all* contributions received under Colo. Rev. Stat. § 1-45-108, regardless of the donor's or the organization's purpose in receiving the contribution.[8] In other words, the Institute contended in the district court that the definition of "issue committee" is facially overbroad because a multi-purpose organization that is deemed to be an "issue committee" must disclose the identities of all of its donors, and all contributions received, not just those related to a ballot measure. However, the Secretary's Rule 4.15 clarified that a "multi-purpose issue committee" (meaning, an issue committee that has purposes other than exclusively ballot issue campaigning) need only report contributions and

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[8] Compl. ¶¶ 34, 36. The Institute's complaint is part of the record below.

expenditures related to its ballot issue advocacy, and not any other financial activity.

Following the promulgation of Rule 4.15, the Institute completely recast its claim of overbreadth, no longer contending that the definition is unconstitutionally overbroad because of the *scope of the contributions* an issue committee must disclose. Instead, the Institute argued (although the claim appears nowhere in its complaint) that the definition is facially overbroad because it reaches groups, like the Institute, that do not have a single major purpose of supporting or opposing ballot initiatives.

In its cross-motion for summary judgment in the district court, the Institute argued that the definition of "issue committee" and the corresponding disclosure provisions under the FCPA are designed to "punish" purely "educational" groups (such as the Institute) merely for "speaking out" about a ballot measure.[9] The Institute repeatedly stressed that it exists strictly to "educate" the public, nothing more.[10]

In the Court of Appeals, however, the Institute asserted for the first time that it "occasionally

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[9] Pl.'s Cross-Mtn. at 1-3, 8. The parties' cross-motions for summary judgment are part of the record below.

[10] *Id.* at 4-5 (discussing the Institute's educational activities in connection with Referenda C and D); *id.* at 10 (stating that the Institute's activities were "educational"; that it was "careful not to tell anyone to vote yes or no on the referenda"; and that it was merely "attempting to educate Colorado citizens about important issues"); *id.* at 15 (stating that the Institute engages only in "issue discussion").

engage[s] in ballot issue advocacy"[11] – an assertion both directly contrary to the arguments the Institute made to the ALJ and the district court, and unsupported by the record in this case. App. 167-68.

In its Petition, the Institute maintains the revised version of its overbreadth claim - that the definition is facially overbroad because it "includes groups that occasionally engage in ballot measure advocacy." Pet. 5. It appears, however, to have backed away from its assertions in the Colorado Court of Appeals that the *Institute* occasionally engages in actual ballot issue advocacy.

Because the Institute has significantly changed its facial overbreadth claim during the course of this litigation, there is now a mismatch between the Institute's current claim of overbreadth and the record developed below. These factors further warrant against this Court's intervention here. Because the Institute's overbreadth allegations took an entirely different focus in the trial court, the Secretary had no opportunity to develop a record in response to the Institute's current iteration of this claim, unveiled long after the close of discovery.

For example, in Colorado, most groups or organizations that want to expressly advocate for the passage or defeat of a particular ballot measure establish a separate issue committee for that purpose and then terminate that committee after the election – just as Mr. Caldara did with "Vote No, It's

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[11] Aplt. Opening Br. at 12, 19, 28, 35. The parties' briefs in the Colorado Court of Appeals are part of the record below.

Your Dough." For these groups, virtually without exception, ballot issue advocacy is not merely "a" major purpose, but the *exclusive* purpose of the group. Given the opportunity to develop a record based on the Institute's revised overbreadth claim, the Secretary would have shown that true "multi-purpose" issue committees in Colorado are exceedingly rare, if not virtually nonexistent. Coupled with the fact that Rule 4.15 requires the rare "multi-purpose" issue committee to disclose only contributions and expenditures made for ballot issue advocacy purposes, the Secretary would have developed a record to rebut the Institute's current version of its overbreadth claim to show that, in actual practice, the provisions are never applied to speech that is unconnected to ballot issue advocacy.

The disconnect between the substantive questions presented in the Petition and the record developed below only reinforces the lack of an actual legal controversy presented by this case. If, in fact, Colorado's definition of issue committee is as broad as the Institute claims, then surely there will be no shortage of multi-purpose issue committees able to present actual examples of its application that Colorado courts – and this Court, if it then chooses – can address. This case presents a purely theoretical facial challenge; the record here presents no concrete example of the law's allegedly overbroad application to any true multi-purpose issue committee, and thus offers no reason for this Court to intervene.

### C. The Institute's allegations of the growing risks of harassment stemming from disclosure rest entirely on speculation and anecdotal accounts from other states.

The Institute and its amici urge the Court to review the Institute's claims regarding the right to anonymous speech, both pointing to the easy accessibility of disclosure information on the Internet and suggestions of harassment and retribution against contributors in controversial ballot campaigns – in *other* states. Pet. 27-28; Br. of Amici 14-17, 21-22.

Because the Institute is not an issue committee, it is not required to reveal the identity of a single donor. Thus, the Institute cannot show that its members face even a theoretical risk of "threats, harassment, or reprisals" linked to the challenged disclosure provisions. *See Buckley v. Valeo*, 424 U.S. 1, 74 (1976). Indeed, the record in this case is utterly devoid of any evidence of harassment or intimidation being wrought against any issue committee in Colorado (or a donor to such a committee). Even assuming the newspaper articles cited in the Petition could constitute valid record evidence here, the only article cited by the Institute or its amici referring to the alleged repercussions of disclosure in *Colorado* discusses picketing and boycotting – not harassment. Pet. 27 (citing Amy Bounds, *Gay rights advocates picket Boulder Cineplex*, Rocky Mountain News, Nov. 30, 2008). In response to allegations of harassment of Prop 8 donors in California, a federal

district court recently observed that many of the acts complained of were actually lawful means of voicing dissent; indeed, picketing and boycotts are lawful forms of peaceful civil protest that are protected by the First Amendment. *See ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1218 (E.D. Cal. 2009).

The record in *this* case presents not a single documented instance of harassment. Furthermore, the Petitioner here does not face even a theoretical risk of harassment or reprisals because it is not subject to the disclosure provisions. Anecdotal accounts of events in other states – matters not before the Court here – do not warrant this Court's intervention here, let alone justify the wholesale invalidation of Colorado's disclosure provisions.

## II. There is no genuine conflict between the Colorado Court of Appeals and the Fourth Circuit warranting this Court's review.

The Institute urges this Court to grant review because the decision of Colorado's intermediate state appellate court appears to conflict with the Fourth Circuit's decision in *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008) ("*NCRTL*"). Pet. 19-22. However, the provisions challenged here regulate only speech that is unambiguously ballot issue campaign related. By contrast, the North Carolina scheme in *NCRTL* threatened to regulate a substantial amount of protected speech because it imposed significantly greater burdens on groups deemed to be political committees.

First, the North Carolina definition of "political committee" at issue in *NCRTL* incorporated no minimum monetary threshold. A group in North Carolina that made *any* contributions or expenditures, no matter how small, fell within the definition of "political committee" if it met any of the other statutory characteristics. *See NCRTL*, 525 F.3d at 286. By contrast, to meet Colorado's definition of "issue committee", a group must not only have "a major purpose" of supporting or opposing a ballot measure, but it must also collect or spend $200 or more for the purpose of supporting or opposing the ballot issue or ballot question. Colo. Const. art. XXVIII, § 2(10)(a)(II); 8 Colo. Code Regs. § 1505-6(1.7(b)). App. 105, 144. Thus, even a group that actively supports or opposes a ballot issue will not be regulated as an issue committee if that $200 threshold is not reached.

Second, in North Carolina, a political committee was required to file a statement of organization revealing all financial depository information for the organization, as well as report all contributions and expenditures made by the committee. *See NCRTL*, 525 F.3d at 286. That is, North Carolina's political committee burdens applied "across the board to *all* of an organization's activities." *Id.* at 303; *see also id.* at 331 (Michael, J., dissenting) (regulations "impact an organization's issue advocacy by requiring disclosure of all donor information and financial receipts and disbursements and by imposing limits on all contributions to it"). Colorado, by contrast, has established tailored reporting requirements for multi-purpose issue committees. Under Rule 4.15, any Colorado issue committee that is not exclusively

dedicated to supporting or opposing ballot issues need report only those financial contributions and expenditures unambiguously related to the committee's ballot issue campaign activity. *See* 8 Colo. Code Regs. § 1505-6(4.15). App. 157. Moreover, while a multi-purpose issue committee must establish a separate bank account for its ballot issue advocacy, *see* 8 Colo. Code Regs. § 1505-6(4.15(b)), App. 157, it is not required to reveal "all financial depository information" of the organization. *Compare NCRTL*, 525 F.3d at 286.

Third, under the North Carolina law, a group deemed to be a political committee was subject to limits on contributions it could receive during an election cycle from any individual or entity. *Id.* at 286. In Colorado, an "issue committee" is not subject to any contribution limits.[12]

Colorado's provisions are thus distinguishable from the scheme examined by the Fourth Circuit in *NCRTL*. To the extent Petitioner cites cases outside the Fourth Circuit that apply *NCRTL* and purportedly conflict with the Court of Appeals' ruling, *see* Pet. 18-19, those cases concerned campaign finance laws far broader than even the provisions challenged in North Carolina, let alone here. For example, the Florida law at issue in *Broward Coalition of Condominiums, Homeowners Ass'n & Cty. Orgs. Inc. v. Browning*, 2008 WL 4791004 (N.D. Fla. Oct. 29, 2008), incorporated no "major purpose" requirement whatsoever. The

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[12] Amici incorrectly state that Article XXVIII imposes contribution limits on issue committees. Br. of Amici at 6.

Florida law subjected groups to the full panoply of PAC-like requirements "if they engage in *any* amount of speech related to elections, regardless of how minor a part of their overall activity." *Broward*, 2008 WL 4791004, at *13. Similarly, the Utah law in *Nat'l Right to Work Legal Defense & Educ. Found., Inc. v. Herbert*, 581 F. Supp. 2d 1132 (D. Utah 2008), applied to groups making any disbursements intended to influence a ballot proposition. Like the Florida law, the Utah provision made no attempt to incorporate any "major purpose" requirement whatsoever. *Id.* at 1153.

Notably, the panel majority in *NCRTL* observed that, while North Carolina was right to believe that large organizations can have a substantial impact on the electoral process even if influencing elections is "merely one of" their major purposes, "narrower means exist[ed]" for North Carolina to achieve its objectives, including reduced reporting requirements limiting regulation to activity that is "unambiguously campaign related." *See NCRTL*, 525 F.3d at 290 (quoting *Buckley*, 424 U.S. at 80). Colorado has taken just such an approach through Rule 4.15. In sum, the provisions challenged here are distinguishable from the scheme held unconstitutional in *NCRTL*; hence, the rulings are not in conflict.

Finally, Colorado's highest state court has not issued any final word construing the meaning or scope of the challenged provisions as a matter of state law, or otherwise weighed in on their federal constitutionality. The Colorado Supreme Court may therefore resolve any alleged conflict with the Fourth

Circuit. The court may have denied certiorari review here because it recognized that the circumstances of the case render it a poor vehicle to address the substantive issues raised. In any event, groups like the Institute are treated no differently in the Fourth Circuit under *NCRTL* than here in Colorado, as they are exempt from regulation under either ruling.

## III. The Colorado Court of Appeals' rulings were consistent with the First Amendment and this Court's precedents.

The Colorado Court of Appeals correctly rejected the Institute's facial constitutional challenges. These rulings were consistent with this Court's precedents.

### A. Colorado's definition of "issue committee" is not unconstitutionally vague.

The Institute claims that the definition of issue committee is facially unconstitutionally vague because it employs the modifier "*a*" instead of "*the*" before the phrase "major purpose." The Institute suggests that *the* major purpose of an organization is easily and objectively determinable, yet *a* major purpose is inherently vague and entirely subjective. Pet. 21. In other words, the Institute claims, it is impossible for a group that has more than one purpose to determine whether one of those multiple purposes is "major." The Court of Appeals correctly rejected this contention.

This Court specifically adopted the phrase "major purpose" as a narrowing construction to save the definition of "political committee" from claims of unconstitutional vagueness. *See Buckley*, 424 U.S. at 77-79 (narrowly construing the phrase "for the purpose of...influencing" to "avoid the shoals of vagueness"; holding that the term "political committee" "need only encompass organizations that are under the control of a candidate or the *major purpose* of which is the nomination or election of a candidate.") (emphasis added).

The Court expressed the concern that, absent this narrowing construction, the definition "could be interpreted to reach groups engaged *purely* in issue discussion." *Id.* at 79 (emphasis added). The Court's construction still provided for flexibility, however: the phrase "*major* purpose" necessarily contemplates that an organization may have other purposes in addition to electoral advocacy. In other words, *Buckley* did not hold that the definition of political committee could constitutionally reach only groups whose "sole" or "exclusive" purpose was nominating or electing candidates. Rather, the Court's "major purpose" construction simply ensured that the definition targeted the "core area" of "campaign-related" activity sought to be regulated by Congress. *See Buckley*, 424 U.S. at 79. By narrowly construing the term "political committee" to include only groups with a "major purpose" of electoral advocacy, it could be assumed that the expenditures of such a group would be, "by definition, campaign related," *id.*, and therefore such a group's activities could be regulated generally.

*Buckley* did not accord talismanic significance to whether "the" or "a" modifies "major purpose," or otherwise establish the modifier "the" as the constitutional boundary beyond which regulation is prohibited. *Cf. McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 190 (2003) (observing that *Buckley*'s narrowed construction of the phrase "relative to" as limited to express advocacy to avoid vagueness "was an endpoint of statutory interpretation, not a first principle of constitutional law"). The phrase "*a* major purpose" represents a narrowing construction that still meets the demands of *Buckley* because it still targets the "core area" of campaign-related activity that is permissibly regulated, while avoiding "reach[ing] groups engaged purely in issue discussion." *See Buckley*, 424 U.S. at 79; *see also NCRTL*, 525 F. 3d at 309 (Michael, J., dissenting).

The approach in *Buckley* is consistent with that taken in a related context in *United States v. Harriss*, 347 U.S. 612 (1954).[13] There, this Court narrowly construed the phrase "principal purpose" in a federal lobbyist disclosure law to avoid vagueness. *See Harriss*, 347 U.S. at 618-24. The Court reasoned that the term "principal" was adopted to ensure that contributions that were substantially directed to influencing legislation were covered, yet exclude contributions having only an "incidental" purpose of influencing legislation. *See id.* at 622. The Court

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[13] The Institute notes that the "major purpose" test in *Buckley* was derived from *United States v. Nat'l Comm. for Impeachment*, 469 F.2d 1135, 1139-42 (2d Cir. 1972). Pet. 13-14. Notably, that Second Circuit decision cites the key passage in *Harriss* discussed here. *See Nat'l Comm. for Impeachment*, 469 F.2d at 1141 (citing *Harriss*, 347 U.S. at 622-23).

observed that to construe the provision to cover only contributions and activities *exclusively* designed to influence legislation would permit a significant amount of conduct to escape regulation: "If it were otherwise – if an organization, for example, were exempted because lobbying was *only one of its main activities* – the Act would...be reduced to a mere exhortation against abuse of the legislative process." *Id.* at 622-23 (emphasis added).

The phrase "a major purpose" still comports with *Buckley* because it cannot be "interpreted to reach groups engaged purely in issue discussion," *Buckley*, 424 U.S. at 79, or even groups that only "occasionally" engage in actual ballot issue advocacy. Moreover, under Rule 4.15, a multi-purpose group with "a" major purpose of supporting or opposing a ballot measure will be regulated only to the extent that such activities are unambiguously campaign related.

Whether one seeks to identify "a major purpose" or "the major purpose" of an organization, the same analysis and evidence may be considered to determine whether ballot issue advocacy constitutes a principal portion of the organization's total activities. App. 15; *NCRTL*, 525 F.3d at 328 (Michael, J., dissenting). If a court considers a variety of objective factors to discern whether a group has ballot issue advocacy as its one central major purpose, then logically it may consider the very same factors to discern whether a group has "at least one" such major purpose. Here, the ALJ considered the length of time the Institute had been in existence; its original purpose; its organizational structure; the various issues with which it had been involved over time; and the amount of money

expended on the radio ads in proportion to its annual budget, and readily concluded that the Institute did *not* have a major purpose of supporting or opposing Referendum C. As the district court observed, the ALJ's task "did not prove overly difficult." App. 35.

### B. Colorado's definition of "issue committee" is not facially overbroad.

The Court of Appeals correctly held that the definition of "issue committee" does not burden a substantial amount of constitutionally protected speech. App. 18-20.

Facial invalidation based on overbreadth is "strong medicine" used "sparingly and only as a last resort." *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973). The Institute bears the burden of demonstrating, from the text of the law and from actual fact, that the overbreadth is not only real, but substantial, judged in relation to the provision's plainly legitimate sweep. *See Virginia v. Hicks*, 539 U.S. 113, 122 (2003); *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *Broadrick*, 413 U.S. at 615.

As noted above, the Institute originally claimed that the definition of "issue committee" and the corresponding disclosure requirements were facially unconstitutional because a multi-purpose group deemed to be an issue committee must disclose *all* contributions to the organization, not just those related to ballot issue advocacy. When it became apparent that under Rule 4.15, a "multi-purpose issue

committee" need report only contributions and expenditures related to its ballot issue advocacy, the Institute recast its claims. It now claims that the definition is overbroad because it reaches groups that do not have a single major purpose of supporting or opposing ballot initiatives.

Colorado's definition of "issue committee" avoids burdening substantial amounts of protected speech. First, to be an issue committee in Colorado, a group must actually "support or oppose" a ballot issue or question. Groups like the Institute that simply "educate" the public do not meet the definition because to "support or oppose" an issue requires a group to take a position advocating the passage or defeat of the measure. *Cf. McConnell*, 540 U.S. at 170 n.64 (the words "support" and "oppose" "provide explicit standards for those who apply them and give the person of ordinary intelligence a reasonable opportunity to know what is prohibited") (internal quotations omitted).

Second, unlike the campaign finance regulations in *NCRTL, National Right to Work Legal Defense and Educ. Found., Inc.*, and *Broward Coalition*, Colorado's definition also establishes a $200 threshold trigger before a group will be deemed an issue committee.

Third, even if a group "supports or opposes" a ballot measure and spends $200 or more toward that effort, it is still not an issue committee if ballot issue advocacy is not a "major purpose" of the organization. Contrary to the Institute's contentions, a group that only "occasionally engage[s] in ballot measure advocacy" does *not* meet the definition. Pet. 5.

Finally, any overbreadth concerns raised by the Institute exist only for a "multi-purpose issue committee," *i.e.*, an organization that has multiple purposes, only one of which is a major purpose of supporting or opposing a ballot measure. However, Rule 4.15 ensures that a multi-purpose issue committee shall *not* be required to report donations, membership dues, or any other receipts except to the extent they are specifically designated or intended to be used for the purpose of supporting or opposing one or more ballot questions. 8 Colo. Code Regs. § 1505-6(4.15(a)). App. 157.

Rule 4.15(a) strikes a balance between a contributor's privacy interests and the government's interest in informing the electorate of who is funding a particular ballot issue campaign. The rule requires disclosure only of contributions or expenditures made for the purpose of supporting or opposing ballot measures. It also permits a multi-purpose issue committee to use general non-earmarked funds to support or oppose a ballot measure, and requires that such an expenditure be reported simply as a contribution from the multi-purpose issue committee itself. Thus, where a donor contributes general, non-earmarked funds to the multi-purpose issue committee, the committee may later transfer such funds to its separate bank account used for ballot issue advocacy and report that transfer as a contribution from the organization, without disclosing the identity of the original donor.

In sum, the Institute cannot show that the definition of "issue committee" regulates a substantial amount of protected speech, either in an

absolute sense or relative to its application to groups engaged solely in ballot issue advocacy. Colorado's definition, as narrowly construed through administrative regulations, complies with *Buckley*, as these provisions are tailored to regulate only unambiguously campaign related activity. *See Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 495 n.5 (1982) (in considering a facial overbreadth challenge to a law, a court must consider any limiting construction that an enforcement agency has offered).

### C. Colorado's disclosure requirements for issue committees do not violate the right to anonymous speech.

Finally, the Court of Appeals correctly rejected the Institute's claims that the disclosure requirements for issue committee violate the right to engage in anonymous speech and association.

The Institute relies on *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995), to contend that Colorado's disclosure requirements violate the right to anonymous speech. The Institute further suggests there is an "inherent tension" between *McIntyre* and the holdings in *Buckley* and *McConnell* requiring this Court's intervention here. Pet. 25.

The Institute's reliance on *McIntyre* is misplaced; the campaign finance disclosure provisions at issue here are categorically different from the handbill disclaimer provision in *McIntyre*. That Ohio provision required speakers to reveal their identity

on actual documents (*e.g.*, handbills, leaflets, etc.) distributed to the public and intended to influence the electoral process. In short, it required individual speakers to reveal their identity contemporaneously with the delivery of a specific political message contained in a document. The Court thus deemed the disclaimer provision to be "a direct regulation of the content of speech." *McIntyre*, 514 U.S. at 345.

There exists no "inherent tension" between *McIntyre* and *Buckley*, as the *McIntyre* Court expressly distinguished the disclosure provisions in *Buckley*. *Id.* at 353. Indeed, the *McIntyre* Court described the mandatory financial reporting of campaign-related expenditures in *Buckley* as a "far cry from compelled self-identification on all election-related writings" covered by the Ohio law. *Id.* at 355.

*Buckley* acknowledged that compelled disclosure implicates privacy of association and belief. *Buckley*, 424 U.S. at 64, 65-66. This Court nevertheless identified three distinct government interests "sufficiently important" to justify compelled disclosure, including the government's substantial interest in providing the electorate with information as to "where ...campaign money comes from and how it is spent". *Id.* at 66; *see also McConnell*, 540 U.S. at 197 (acknowledging the First Amendment interest of individual citizens "seeking to make informed choices in the political marketplace") (internal quotations omitted).

The Court has never recognized a generalized right to anonymous speech. *McIntyre*, 514 U.S. at 379-80 (Scalia, J., dissenting). The Court has

acknowledged that disclosure of contributions to candidates and parties may deter some individuals who might otherwise contribute, and may even expose some contributors to harassment or retaliation. *See Buckley*, 424 U.S. at 68. Nonetheless, the Court acknowledged that "disclosure requirements certainly in most applications appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* The Court therefore has "recognized a right to an *exemption* from otherwise valid disclosure requirements on the part of someone who could show a 'reasonable probability' that the compelled disclosure would result in 'threats, harassment, or reprisals from either Government officials or private parties.'" *McIntyre*, 514 U.S. at 379 (Scalia, J., dissenting); *see also Buckley*, 424 U.S. at 74. Under this approach, "[a]nonymity can still be enjoyed by those who require it, without utterly destroying useful disclosure laws." *Id.* at 380 (Scalia, J., dissenting).

In sum, only specific evidence of threats or harassment will justify an exemption from disclosure of contributions and expenditures. As discussed above, the record here is devoid of any such evidence. Instead, the Institute contends that disclosure *always* poses an unconstitutional burden on speech. The Colorado Court of Appeals properly rejected this facial attack.

The Court of Appeals also correctly concluded that, although this Court has not squarely addressed the constitutionality of disclosure of contributions and expenditures in ballot issue campaigns, dicta in

this Court's post-*Buckley* decisions reflect the implicit approval of financial disclosures in ballot issue elections.

In both *Bellotti* and *Citizens Against Rent Control*, this Court struck down *substantive limits* on the quantity of speech in ballot issue campaigns. *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (striking criminal statute prohibiting corporations from making contributions or expenditures for the purpose of influencing or affecting the vote on any question submitted to the voters other than one materially affecting the corporation); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (striking $250 limit on contributions to committees formed to support or oppose ballot measures). In each of these cases, however, this Court noted in dicta that the disclosure provisions that remained in place served the voters' interest in the ballot issue context. *See Bellotti*, 435 U.S. at 792 n.32; *Citizens Against Rent Control*, 454 U.S. at 299-300.

Similarly, in *Buckley v. American Const. Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), a decision issued after *McIntyre*, this Court addressed the disclosure of contributions and expenditures in Colorado at the petition stage of a ballot issue campaign. Although the Court struck down, among other things, a disclosure provision requiring petition circulators to wear identification badges, it emphasized that its decision "separates petition circulators from the proponents and financial backers of ballot initiatives," *ACLF*, 525 U.S. at 194 n.16, noting that, "Through the disclosure

requirements that remain in place, voters are informed of the source and amount of money spent by proponents to get a measure on the ballot; in other words, voters will be told who has proposed [a measure], and who has provided funds for its circulation." *ACLF*, 525 U.S. at 203 (internal quotations omitted).

In sum, the Colorado Court of Appeals correctly interpreted post-*Buckley* decisions of this Court to indicate that the voter informational interest articulated in *Buckley* justifies disclosure of contributions and expenditures in ballot issue campaigns.

## CONCLUSION

The petition for writ of certiorari to the Colorado Court of Appeals should be denied.

Respectfully submitted,

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In The
# Supreme Court of the United States

INDEPENDENCE INSTITUTE,

*Petitioner,*

v.

BERNIE BUESCHER, SECRETARY OF STATE, STATE OF COLORADO,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado**

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## I. INTRODUCTION.

On October 20, 2009, this Court, with one Justice dissenting, issued a stay in *Doe v. Reed*, No. 09A356 (Oct. 20, 2009), and preserved the anonymity of petition signatories until this Court determines whether to accept the case for review. Petitioner Independence Institute's petition for certiorari in the instant case raises First Amendment questions that are analytically similar to those at issue in *Reed*, but which will not be decided in *Reed* if this Court accepts that case. The two cases focus on different stages of a ballot measure's life cycle. *Reed* raises the question of whether signatories to a petition to place an issue on the ballot have a right to anonymous speech and association and whether the disclosure of their identities violates those rights. The instant case raises the question of whether those who contribute to a group that supports or opposes a measure that has reached the ballot have a right to maintain their anonymity and whether disclosing their identities violates their rights to speech and association. The issues are thus similar, but arise at different stages of the ballot measure campaign process, where both the governmental interests at stake and the nature of the speaker's interest in anonymity are different. A decision for the plaintiffs in *Reed* would thus not resolve the issue presented by this case. In other words, if this Court addresses the issue presented by *Reed*, it would leave unsettled the issue of the constitutionality of disclosure after a measure has qualified for the ballot.

Despite Respondent's arguments in opposition, this case presents a justiciable controversy and raises issues that are recurring, of national import, and should be settled by this Court. The Court should grant certiorari both here and in *Reed* to set clear standards for the protection of the rights to speech and association at all stages of the public's consideration of ballot measure questions.

## II. THIS CASE RAISES ISSUES THAT ARE SIMILAR TO *DOE v. REED* AND EQUALLY IMPORTANT, BUT WHICH WILL NOT BE ADDRESSED IF THIS COURT ACCEPTS THAT CASE FOR REVIEW.

On October 20, 2009, this Court issued its stay in *Reed*, a case concerning the constitutionality of disclosing the names and addresses of signatories to a petition to place a referendum on the Washington State ballot concerning that state's domestic partnership law. *See Doe v. Reed*, Nos. 09-35818, 09-35826, 09-35863, 2009 WL 3401297, at *3 (9th Cir. Oct. 22, 2009) (discussing procedural history). The plaintiffs sought a temporary restraining order from the district court, which that court granted. *Id.* The Ninth Circuit reversed and lifted the injunction. *Id.* The plaintiffs sought a stay with this Court, which Justice Kennedy, acting as Circuit Justice, granted and referred to the full Court, which concurred. *Doe v. Reed*, No. 09A356 (Oct. 20, 2009).

Both *Reed* and the instant case raise an issue that is of fundamental importance but that this Court's prior rulings do not answer: whether a state has a sufficiently compelling interest to justify requiring individuals who sign petitions supporting the placement of an issue on the ballot, or who contribute money to a group supporting or opposing an issue once it is placed on the ballot, to disclose their identities – including, in some cases, their addresses and even the names and addresses of their employer. This Court has held that individuals have a First Amendment right to anonymous speech, *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995) ("[the] decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment"); it has held that speech about ballot issues is core political speech at both the petition stage, *Meyer v. Grant*, 486 U.S. 414, 421-22 (1988) ("the circulation of a petition involves . . . 'core political speech'"), and at the elections stage, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978) (holding that speech concerning a ballot measure "is intimately related to the process of governing" and therefore warrants strict scrutiny); it has held that individuals have a right to associate for the purpose of promoting the passage or defeat of a ballot issue, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) ("There are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them."); and it has held that

disclosure of group affiliation can severely burden and chill the right of political association, *NAACP v. Alabama*, 357 U.S. 449, 462 ("compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [direct] governmental action . . ."), *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97 (1982) (extending *NAACP* to disclosure of campaign disbursements, which could lead to harassment in the case of unpopular causes). But this Court has not decided whether these precedents permit states to require individuals who sign petitions to place an issue on the ballot or who financially support or oppose that issue once it is on the ballot to disclose their identities, addresses, and sometimes even their employers.

The considerations that led this Court to issue the stay in *Reed* should lead it to grant certiorari in this case. Moreover, this case presents additional considerations regarding the constitutional protection of anonymous speech and association that are not present in *Reed* – considerations that militate in favor of protecting these rights. Specifically, the citizen's interest in anonymity is stronger regarding contributions to a ballot measure committee than in signing a petition to place a measure on the ballot. A contribution demonstrates the citizen's support of or opposition to the substance of the measure, while a signature on the petition may simply mean that the citizen wishes the public to vote on that issue. *See Doe v. Reed*, Nos. 09-35818, 09-35826, 09-35863, 2009 WL 3401297, at *6 (9th Cir. Oct. 22, 2009). ("Referendum petition signers, however, cannot be considered

'generally' in favor of a particular ballot issue."). *See also McIntyre*, 514 U.S. at 355 (noting that laws requiring disclosure of the "contents of [an individual's] thoughts" are "particularly intrusive"). In addition, the government's interest in disclosure is different at the signature-gathering stage and the time of the actual election. In *Reed*, the government argued that disclosure is necessary to allow the public to "independently examine whether the State acted properly in determining whether a referendum measure qualified for the ballot." *Doe v. Reed*, No. C09-5456, 2009 WL 2971761, at *9 (W.D. Wash. Sept. 10, 2009). No such interest exists regarding disclosure of those contributing to a measure that has already qualified for the ballot, as was the case here.

A Circuit Justice may grant an application for a stay of a decision of a Court of Appeals if there is (i) a likelihood of irreparable injury that, assuming the correctness of the applicant's position, would result were a stay not issued, (ii) a reasonable probability that the Court will grant certiorari, and (iii) a fair prospect that the applicant will ultimately prevail on the merits. *Planned Parenthood of Se. Pennsylvania v. Casey*, 510 U.S. 1309, 1310 (1994) (Souter, J., in chambers). Thus, in *Reed*, this Court has indicated that the disclosure of political activity in the signature-gathering stage raises an issue about which there is a reasonable probability this Court may grant certiorari and that there is a fair prospect that those seeking to keep their political activity anonymous will ultimately prevail on the merits. The instant case, on the other hand, presents similar substantive issues at

a significantly different stage of the electoral process. Thus, certiorari is warranted in both cases so that this Court may clearly establish whether, or to what extent, disclosure of political activity is constitutionally permissible in the ballot measure context across the entire life of a campaign.

The lower courts have struggled with this issue, but have generally concluded that such disclosure is permissible. In so doing, they have routinely blurred together candidate and ballot measure elections, despite the fact that "[t]he risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." *Bellotti*, 435 U.S. at 790. *See, e.g., Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (noting a single government "interest in providing the electorate with information related to election and ballot issues"); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003) (concluding that the same interests control in both types of campaigns); *State v. Marshall*, 633 P.2d 227, 235-36 (Alaska 1981) (no mention of differences between candidate and initiative campaigns). This blurring overlooks the fact that voters on a ballot measure need not worry about "where political campaign money comes from and how it is spent by the candidate," where "to place each candidate in the political spectrum," or "to [which] interests a candidate is likely to be most responsive." *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976). A ballot measure cannot be corrupted; its effect cannot be changed or manipulated

by donor money. The rationale for disclosure in candidate campaigns thus has limited, if any, utility in ballot measure campaigns.

## III. A JUSTICIABLE CONTROVERSY EXISTS HERE BECAUSE THE VAGUENESS OF COLORADO'S LAW PLACES THE INSTITUTE UNDER THE CONSTANT THREAT THAT ITS SPEECH ABOUT BALLOT ISSUES WILL MAKE IT AN ISSUE COMMITTEE.

Respondent contends that Petitioner's claims are nonjusticiable by assuming away Petitioner's two main arguments about the statute: first, that the law is vague, and second, that the solution to this vagueness problem cannot be to force Petitioner to litigate the question of whether it is an issue committee each time it wishes to speak about a ballot measure. As a result, Respondent is left with a circular argument: Respondent simply asserts that the law is not vague because an Administrative Law Judge was able to determine that the Institute was not an issue committee, and, because of this determination, the Institute cannot be injured going forward. Respondent's argument is illogical, wrong on the facts, and wrong on the law.

Respondent asserts, without any support, that "[i]t is undisputed that the Institute is not an issue committee" and therefore does not fall within Colorado's Fair Campaign Practices Act (FCPA). Opp. 12.

The basis for Respondent's conclusion is the Administrative Law Judge's (ALJ) decision regarding Petitioner's speech concerning Referenda C and D in 2005. Opp. 7. That decision does not bear the weight Respondent places on it. It applies only to one complaint from one citizen. Under Colorado law, an administrative law judge's decision binds only the particular parties to the proceeding. *See Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430, 434 (Colo. Ct. App. 2003). The ALJ's decision would not even have precluded another complaint against Petitioner brought by a different citizen during the Referenda C and D campaign, let alone complaints brought against it for its speech in subsequent elections. Each complaint claiming Petitioner is an issue committee would trigger a new administrative hearing in which the decision of November 4, 2005 would have no weight at all. Thus, Respondent's claim that the ALJ's decision "conclusively" places Petitioner outside the definition of an issue committee for all time is simply wrong. Opp. 12.

Moreover, even if the ALJ's decision somehow determined the scope of the statute and its application in perpetuity, the reasoning employed by the ALJ – and adopted by the Colorado Court of Appeals – provides no guidance as to when and under what circumstances speakers become issue committees during elections. For example, in interpreting "major purpose," the ALJ considered the number of topical issues Petitioner studies, the extent to which

Referenda C and D dominated any of Petitioner's "policy centers," whether Petitioner's mission changes with each election, the amount of time Petitioner's staff dedicated to the referenda, and the portion of Petitioner's budget expended on Referenda C and D. App. 65-68. However, neither the ALJ nor the Colorado Court of Appeals was able to give any indication of the weight or importance speakers are to give to each term in this definitional labyrinth or reveal how these standards are to be applied in the future.

Respondent likewise dismisses the possibility that Petitioner could ever be an issue committee because it "does not actually 'support or oppose' any ballot issue." Opp. 13. This conclusion appears to rest on the fact that Petitioner did not urge a "yes" or "no" vote on the referenda. Opp. 12. Here, Respondent makes yet another unsupported assumption: that the phrase "support or oppose" in the statute means express advocacy. Opp. 29. Not surprisingly, Respondent does not cite to a single Colorado case – or even a regulation or advisory opinion – that indicates "support or oppose" means express advocacy. While "support or oppose" may, in some circumstances and in some statutes, constitute express advocacy, no court has held that that is true as a universal matter of constitutional law, statutory interpretation, or Colorado law. *Cf. North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 283 (4th Cir. 2008) (striking down as unconstitutionally vague North Carolina's attempt to define "support or oppose" to mean the functional equivalent of express advocacy by

reference to the communication's "essential nature"). Thus, Respondent's latest attempt to rewrite the statute to narrow it to only words of express advocacy fails.[1]

The net result of Respondent's position is that Petitioner can only guess when speech criticizing or extolling the virtues of certain ballot measures in the future will render it an issue committee. The only definitive answer will come after expensive and time-consuming litigation. *Cf. Fed. Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469 (2007) (rejecting an intent standard for express advocacy because it would "typically lead to a burdensome, expert-driven inquiry with indeterminate result," which "will unquestionably chill a substantial amount of political speech"). In that regard, Respondent ignores the fact his office does not control when the FCPA is enforced against speakers. As this case illustrates, politically-motivated complainants may initiate administrative proceedings against speakers whom they believe to have violated the law. COLO.

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[1] Moreover, incorporating an "express advocacy" test into Colorado's law makes no sense. This Court created the "express advocacy" test in *Buckley* to limit campaign finance regulations to apply to only those actions that are "unambiguously related to the campaign of a particular federal candidate," so that such regulations did not reach "issue discussion[s]." *Buckley*, 424 U.S. at 79-80. But advocacy of ballot measures is inherently issue advocacy. To import the "express advocacy" standard into laws concerning ballot measures would thus regulate the very speech this Court said could not be regulated.

REV. STAT. § 1-45-111.5(1.5)(a) (2009). This private enforcement provision (which is commonplace in state laws regulating campaign finance) renders Respondent's assurances unpersuasive. Because the statute gives individuals – themselves often interested in the outcome of an election – the power to saddle their opponents with the cost of defending a complaint, the Institute's experience during the Referenda C and D election will most assuredly be repeated. *See Davis v. Fed. Election Comm'n,* 128 S. Ct. 2759, 2767-70 (2008) (rejecting justiciability objections to a suit challenging a campaign finance law that had already been applied to the plaintiff and was likely to be applied again).

Citizens should not be required to resort to predicting the future in order to exercise their First Amendment rights. Petitioner speaks out about ballot issues during virtually every election cycle. App. 167. Under the vague definition of "issue committee," Petitioner and other groups like it are unable to know in advance whether they must register as an issue committee and comply with burdensome regulations, including the requirement of disclosing contributions and expenditures. The constant threat of enforcement and penalties for violating the law demonstrates both the chilling effect of speech regulations and the vitality of the controversy between Petitioner and Respondent. After its previous experience with this statute and its longstanding activities, it is clear that Petitioner possesses "an actual and well-founded fear that the law will be enforced against [it]" in the

future. *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

## IV. CONCLUSION.

For these reasons, and the reasons stated in the petition, Petitioner Independence Institute respectfully requests that this Court grant its petition for certiorari.

Respectfully submitted,

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No. 09-265

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In The
# Supreme Court of the United States

INDEPENDENCE INSTITUTE,

*Petitioner,*

v.

BERNIE BUESCHER,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of Colorado**

## BRIEF OF THE CATO INSTITUTE, WYOMING LIBERTY GROUP, CENTER FOR COMPETITIVE POLITICS, SAM ADAMS ALLIANCE, MONTANA POLICY INSTITUTE AND GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICI CURIAE*[1]

The Cato Institute, Wyoming Liberty Group, Goldwater Institute Scharf-Norton Center for Constitutional Litigation, Montana Policy Institute, and Sam Adams Alliance are a variety of nonpartisan public policy research organizations, each advancing the principles of liberty, free markets, and limited government in their own capacity. Each group supports public policy founded on these principles through research, studies, policy briefings, forums, and editorials. The Center for Competitive Politics is a nonprofit advocacy organization that works to protect and promote the First Amendment political rights of speech, assembly, and petition. This case is of central concern to these *amici* because it addresses the further collapse of constitutional protections for political speech and freedom of association, which lies at the very heart of the First Amendment – particularly for think tanks and other organizations that regularly comment on public policy matters.

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

## SUMMARY OF ARGUMENT

1. The constitutional protection offered to citizens banded together under the First Amendment to associate and speak out about referenda measures has been whittled away by lower courts nationwide. This Court should grant review to preserve this indispensable tool of self-governance.

2. Existing judicial standards for protecting associational privacy prove ineffective in the Google Age. Citizens need not wait until they have been injured before their First Amendment rights will be vindicated. This Court should grant review to ensure that associational rights are protected before citizens nationwide suffer additional harm.

## ARGUMENT

### I. This Much is Clear: Governments Possess No Authority to Bedevil Civic Associations

The First Amendment right of citizens to speak up and reform government is perhaps the most revered component of our civil society. When unshackled, citizens thrust themselves into all sorts of public issues. From Margaret McIntrye, with her anonymous pamphlets opposing a school tax, to the Independence Institute, and its educational website discussing fiscal responsibility, citizens have relied on this Court to protect their constitutionally protected right to gather together and speak. *McIntyre v. Ohio*

*Elections Comm'n*, 514 U.S. 334 (1995). Were it otherwise, people of common means would lose a most effective custodian of free society: the right of association. *Citizens Against Rent Control v. City of Berkeley* (*Citizens*), 454 U.S. 290, 294 (1981).

Currently, the steady drumbeat of paternalism acts as a basis for limiting key associational and speech freedoms. Self-styled reform organizations (the "Reform Lobby") work with great fanfare to illustrate that citizens should not be trusted with an open trade of ideas in which to discuss the merits of competing policy options. Corruption or its appearance, a supposed distortion of the marketplace of ideas, and egalitarian ideals are all proffered as sound bytes to limit constitutional protections. *See, e.g.*, *FEC v. Wisc. Right to Life, Inc.*, 127 S. Ct. 2652 (2007); *McConnell v. FEC*, 540 U.S. 93 (2003); *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990). In many instances courts have adopted these theories to uphold burdens placed on civic groups engaged in referendum advocacy. As recognized in other contexts of the First Amendment, such reporting and organizational requirements impose real burdens on citizens just wanting to speak out, ensuring many will stay home silenced. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

It was not always so. Under this Court's traditional constitutional formula used in campaign finance cases, once political candidates leave the speech equation, we are left with but citizens convincing other citizens about the value of their

positions, for better or worse. In such a field, there is no government justification for state-intervention into the intimate details of civic groups. *See, e.g., NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1 (1974). And this Court should be loath to find one.

Review is appropriate here because think tanks and civic groups face state-sponsored intimidation when they speak out about referenda and have little recourse in the lower courts. While this Court has been clear that only *Buckley*'s *quid pro quo* form of corruption could serve to limit constitutional rights held by citizens engaged in political speech, lower courts nationwide have been far less consistent in their protection. Routinely, courts apply conflicting standards when assembled citizens seek protection from intrusive state disclosure requirements. *See, e.g., ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1209 (E.D. Cal 2009); *Swaffer v. Cane*, 610 F. Supp. 2d 962, 968 (E.D. Wis. 2009); *Independence Institute v. Coffman*, 209 P.3d 1130, 1141-43 (2009); *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1314 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 173-74 (D. Me. 1999). With a roster of upcoming and important referenda items nationwide, review would be beneficial to set the constitutional slate clean, clearing the current chill against associational rights.

### A. Colorado's Current Restrictions on Citizen Participation are Part of a Historical Pattern of Legislative Hostility Against Citizens Criticizing the State

Historically, Colorado was a strong proponent of government accountability represented by its referendum process. Some Colorado legislators found the notion of accountability vexing and favored legislative insulation. For example, in 1932, the legislature enacted a discriminatory tax against margarine to protect local dairy interests from competition. Dennis Polhill, INITIATIVE AND REFERENDUM IN COLORADO at 5 (Initiative and Referendum Institute, Dec. 2006). Citizens, mindful of their duty to keep their public servants in check, launched a referendum to strike down the tax increase. Not enjoying oversight, the state legislature thereafter included "safety clauses" to prevent citizens from striking down or modifying laws through the referendum process. *Id.* Between 1933 and 1995, some 18,000 bills included safety clauses to prohibit citizens from countering the will of the legislature. *Id.*

Realizing that the electorate might only tolerate outright bans for only so long, legislators amended the state constitution to make it more difficult for citizens to band together and speak collectively about referenda. According to Article XXVIII of the Colorado Constitution, citizens assembled together who spend or accept more than a paltry $200 to "support or oppose any ballot issue or ballot question" are

required to register as an "issue committee" or "multi-purpose issue committee" and comply with laws regulating them. 8 C.C.R. § 1505-6 (4.15) (2007). Or, should the state find an assembled group of citizens as possessing "*a*" major purpose of supporting or opposing a ballot issue, Article XXVIII imposes registration and compliance requirements. *Id.* These requirements include limits on how much money the gathered citizens may collect in addition to expenditure and reporting requirements – just for coming together to speak about a public issue with other citizens. *See* C.R.S. § 1-45-108(1)(b); 8 C.C.R. § 1505-6(4.15). Colorado requires citizens banded together, so-called issue committees, to disclose anyone who has given as little as $20 so it can post contributors' identities on the Internet. C.R.S. § 1-45-108 & 109.

In the Google Age, this kind of technological voodoo shuts out citizen participation more effectively than a ban ever could. Throughout Colorado's history, the legislature has feared the otherwise healthy criticism of its errant laws. It should remain evident to this Court that Article XXVIII ensures less, not more, accountability for irresponsible legislatures by suppressing speech and association.

### B. Imagined Corruption is a Growth Industry, Not a Compelling Government Interest

The founding generation understood that citizens and interests banded together would forever influence

the electoral and policy landscape, and rightfully so. *See, e.g.*, THE FEDERALIST, No. 10 (James Madison) (on the import of factions); John Ehrenberg, *Civil Society: The Critical History of an Idea*, ch. 6 (1999) (Civil Society and Intermediate Organizations). In a free society, associations act as amplifiers, permitting citizens of common means to come together and have an effective voice. *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 309 (1984).

In today's political climate, the Reform Lobby has waged a public campaign of fear and loathing against civic associations. Toward that end, the Reform Lobby has been busy conjuring a public campaign even George Orwell would be proud of: Suppression is freedom – association is treason – speech is distortion. Muting some at the expense of others turns into "Clean Elections." *See McComish v. Brewer*, No. CV-08-1550-PHX-ROS, slip op. (D. Az., Oct. 17, 2008) (Order concluding "Plaintiffs have established that the Matching Funds provision of the [Clean Elections] Act violates the First Amendment"). Suppressed speech finds a new home as "equal speech." Supplemental Brief of League of Women Voters in *Citizens United v. FEC*, 08-205 (2009) at 2-3 (in favor of suppression against some to enact "more meaningful political participation" for others). In the plain light of day, these efforts have dampened citizen speech about candidates and, what were previously untouchable, referenda, the next frontier of speech suppression.

In the art of political persuasion, image is everything. Take the example of former Pew Charitable Trusts representative Sean Tregalia. In 2004, he permitted a little truth to slip out when he revealed that Pew and others put millions of dollars into supporting scholarly experts, nonprofits, and media centers to fabricate that Americans were concerned about the appearance of corruption. William A. Schambra, *In a World of Bloggers, Foundations Can Expect More Scrutiny,* Chron. Philanthropy, May 12, 2005 (available at http://philanthropy.com/free/articles/v17/i15/15004601.htm). "The idea was to create an impression that a mass movement was afoot – that everywhere they looked, in academic institutions, in the business community, in religious groups, in ethnic groups, everywhere, people were talking about reform." *Id.* The Reform Lobby, including George Soros's Open Society Institute, invested heavily in these efforts – having spent nearly $123 million since 1994 to get others' money and views out of politics. *Id.*

The Reform Lobby has moved boldly away from preventing corruption to chasing other public policy goals. Just as Colorado legislators did not much appreciate citizen oversight in 1932 and banned reprisal, the Reform Lobby did the same in 2002, when Colorado passed Amendment 27 as the first domino in speech reduction. Assistance came from a variety of Reform Lobby advocates – with total spending on the "yes" campaign amounting to some $163,000. *A Buyer's Guide to Ballot Measures: The*

*Role of Money in 2002 Ballot Initiative Campaigns* (Ballot Initiative Strategy Center Foundation, March 2003). No matter the spending or groups involved, a constitutional truth remains: The suppression of factions simply does not work. In polling, trust in government increased among Americans after 1979 when national parties were first allowed to raise "soft money" and went up again from 1995 to 2002 during the fastest growth of soft money recorded. Post passage of the Bipartisan Campaign Reform Act in 2002, that trust declined. John Samples, THE FALLACY OF CAMPAIGN FINANCE REFORM, 114-15 (2006). Increasingly, it has been shown that campaign finance restrictions do not increase public confidence in government. David Primo, *Public Opinion and Campaign Finance*, Cato Institute Briefing Paper (Jan. 31, 2001). But the reform lobby remains undeterred.

While the Reform Lobby may rush into states and run effective campaigns to suppress speech and association, this Court should exercise great skepticism in accepting the government interests behind such intrusion. More often than not, hurried campaigns to regulate civic associations stem not from the pursuit of idealistic goals, but from the desire to shut others out of the debate completely. In the realm of referenda, this Court should give instruction to lower courts that the abridgement of speech and association will not be tolerated, no matter how creative the ideas supporting their suppression.

### C. Lower Courts Routinely Err by Finding Referenda Related Speech as Posing a Threat of Corruption

Whatever government interests might exist for regulation in candidate-related elections, no similar justifications apply to referendum matters. *Citizens*, 454 U.S. at 299. Indeed, even the limited interests supporting intrusion into citizens' speech about candidates appears to be in decline. *See Citizens United v. FEC*, oral argument transcript at 66 (Roberts, C.J., noting that "we don't put our First Amendment rights in the hands of FEC bureaucrats"). What the *Buckley* Court held as a binding principle 33 years ago remains equally binding today: "To the extent that large contributions are given to secure a political *quid pro quo* from current and potential office holders, the integrity of our system of representative democracy is undermined." Once the link between contributor and candidate is broken, government's ability to regulate and interfere with political speech is similarly severed. *Citizens*, 454 U.S. at 298-99. "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections simply is not present in a popular vote on a public issue." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

Just recently, the D.C. Circuit Court of Appeals recognized that pursuant to *Cal-Med Ass'n v. FEC*, 453 U.S. 182, 202-03 (1981) and *Marks v. U.S.*, 430 U.S. 188, 193 (1977), Justice Blackmun's opinion in

*Cal-Med* is controlling. *Emily's List v. FEC*, 1:05-cv-00049-CKK, Sept. 18, 2009). It provides that "contributions to a committee that makes only independent expenditures pose no threat of actual or potential corruption." *Id.* "By pooling their resources, [citizens] amplify their own voices; the association is but the medium through which its individual members seek to make more effective the expression of their own views." *Id.* In sum, government enjoys no authority to regulate or limit contributions to a non-profit that only makes expenditures – that is, speech about issues of the day.

This Court has continued to recognize that preventing corruption or its appearance are the only compelling government interests identified for restricting campaign finances. *Davis v. FEC*, ___ U.S. ___, 128 S. Ct. 2759, 2773 (2008) (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting)) ("'[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.'"). While state governments maintain their own interests in regulating candidate committee contributions and expenditures, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens*, 454 U.S. at 299. By making it burdensome for Coloradoans to associate and speak about referenda, Colorado has accomplished indirectly what it is forbidden to do directly.

Outside of the narrow field of referenda campaigns, this Court has stricken laws that limit citizens from associating or speaking in the context of union organizing and charitable solicitations. In *Riley v. National Fed. of the Blind,* this Court would not let stand state-mandated solicitation rules imposed on charities, in part because "we presume that speakers, not the government, know best both what they want to say and how to say it." 487 U.S. 781, 791 (1988) (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 224 (1987)). Similarly, in *Thomas v. Collins*, this Court stuck down registration requirements for union organizers because of the abridgement of their First Amendment associational rights. The *Collins* Court remained mindful of the presumptive strength liberty enjoys against suppression. 323 U.S. 516, 530 (1945) ("That priority gives these liberties a sanctity" and "it is the character of the right, not of the limitation, which determines what standard governs the choice"). It remains an anomaly how Colorado's registration and disclosure laws targeting civic associations speaking about issues they care about – referenda – could be sustained.

The unfortunate trend in courts below has been to ignore or revamp the core protections recognized by this Court, leading to an array of misplaced standards that do not adequately protect the right of private citizens to associate together privately. *See, e.g.*, *Real Truth About Obama, Inc. v. FEC*, No. 08-1977, 2009 WL 2408735 at *6 (4th Cir. Aug. 5, 2009);

*Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178-87 (9th Cir. 2007); *Ctr. for Individual Freedom, Inc. v. Ireland*, 613 F. Supp. 2d 777, 795 (S.D.W.V. 2009); *ProtectMarriage.com*, 599 F. Supp. 2d 1197; *Swaffer v. Cane*, 610 F. Supp. 2d 962; *Broward Coalition of Condominiums, Homeowners Ass'ns & Cty. Orgs. Inc. v. Browning*, 2008 U.S. Dist. LEXIS 91591, at *41 (N.D. Fla. Oct. 29, 2008); *Coffman*, 209 P.3d 1130.

## II. The State's Trespassing Eyes Prove Harmful in the Google Age

### A. Mandatory Disclosure Poses Real Threats to Liberty, Property, and Security – Including Death Threats, Job Losses, and Bloody Noses

In the landmark case of *Alabama*, this Court recognized that "compelled disclosure of . . . [the NAACP's] membership lists" will "abridge the rights of its rank-and-file members to engage in lawful association in support of their common beliefs." 357 U.S. at 460. Abridgement of First Amendment associational privacy would lead to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." *Id.* at 462. Today, in the context of ballot measure advocacy, abridgement of associational privacy through state campaign disclosure laws continues to chill association in myriad forms.

At the time of the *Alabama* decision African Americans and supporters of the Civil Rights Movement still faced the threat of lynching. *See* Douglas O. Linder, Lynching Statistics by Year, http://www.law.umkc.edu/faculty/projects/ftrials/shipp/lynchingyear.html (University of Missouri-Kansas City School of Law). Medgar Evers, a prominent NAACP leader, was assassinated in 1963 and Martin Luther King was assassinated some five years later. *See* Donna St. George, *31 Years Later, Mississippi Seeks Justice for Medgar Evers' Murder*. KNIGHT RIDDER/TRIB. NEWS SERVICE. Jan. 24, 1994; Earl Caldwell, *Martin Luther King Is Slain in Memphis; A White Is Suspected; Johnson Urges Calm*, N.Y. TIMES, Apr. 5, 1968, at 1. While it was private actors who murdered these civil rights icons, governments harassed and intimidated the NAACP. *See, e.g.*, *Dogs, Kids, & Clubs*, TIME, May 10, 1963, at 19. For the NAACP to remain viable and grow to the organization it is today, protection of its rank-and-file membership from forced disclosure and dissemination was essential.

It is important to note the *Alabama* Court's recognition that even lesser harms were sufficient to abridge citizens' associational rights – including the manifestation of public hostility. These harms prove all too frequent to citizens who donate to ballot referenda campaigns today. Following the recent passage of the Proposition 8 ballot measure in California, which amended the California state constitution's definition of marriage, various donors

to pro-Proposition 8 groups faced mob-like organized harassment and intimidation. "Some donors to groups supporting the measure . . . received death threats and envelopes containing powdery white substance. . . ." Brad Stone, *Disclosure, Magnified On the Web*, N.Y. TIMES, Feb. 8, 2009, at A3. Scott Eckern, the director of the California Musical Theater in Sacramento, was forced to resign when anti-Proposition 8 advocates deluged the theater with complaints. John R. Lott Jr. and Bradley Smith, *Donor Disclosure Has Its Downsides*, WALL STREET J., Dec. 26, 2008, at A13. Harassment was not limited to pro-Prop 8 donors: "[a]t least one businessman who donated to 'No on 8' . . . received a letter from the Prop. 8 Executive Committee threatening to publish his company's name if he didn't also donate to the 'Yes on 8' campaign." *Id.*

The damning harms recognized in *Alabama* due to compelled disclosure of membership and donor lists prove all too real in the Google Age. In the case of Proposition 8, all of the injuries at issue in *Alabama* were present, and they continue to be present in ballot advocacy campaigns nationwide. Something has gone decidedly wrong when governments treat referenda supporters in a manner akin to convicted criminals – making private details of their lives available on the Internet.

The twin horrors of harassment and intimidation follow soon after the state intervenes in the private affairs of citizens bound together and forces them to name names. This is especially relevant in a

continued era of rapid technological advancement. Once, it was the practice for secretaries of state to keep ballot measure disclosure records in a central location. Now most states – including Colorado – make these records available on the Internet. C.R.S. § 1-45-108. The implications of this are profound: in some instances, records are copied in their entirety and made available in more prominent locations. *See, e.g.*, Proposition 8 Contributions, http://www.sfgate.com/webdb/prop8/. Effective pairing of state-coerced membership and donor lists with online map websites permits the especially nefarious to pinpoint the locations of individual donors, even in states where the full address of the donor is not disclosed. *See, e.g.*, Eightmaps, http://www.eightmaps.com; KnowThy Neighbor.org, http://www.knowthyneighbor.org. Meanwhile, the Internet itself has become more accessible. Until recently, Internet access was limited to home or office computers. Now, laptops and Blackberries can access the Internet wirelessly from almost any location.

The new national and technological circumstances mentioned allow one's political or social positions to be quickly ascertained almost anywhere at any time, and this "may induce members to withdraw from the [a]ssociation and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and the consequences of exposure." *Alabama*, 357 U.S. at 463. Citizens in California hoping to speak out, for good or bad, about the merits of Proposition 8 suffered the

ill-fate of enduring white powdery substances, forced resignations, and death threats – much as the NAACP did when it developed its organization and public message. The current abridgement of associational rights faced by numerous groups and individuals throughout the United States is more subtle, but nonetheless detrimental, to political speech. Gauging the effect of this chill is next to impossible, for many – indeed, most – affected by this chill are equally afraid to step forward. Nevertheless, this Court should give the chilling effect of disclosure due consideration and reaffirm the First Amendment rights to associational privacy and anonymity.

### B. Bruised and Battered Cannot be the Judicial Standard for Protecting Associational Privacy

This Court should not overlook the widespread harm faced by citizens active in ballot measure campaigns due to muddled standards followed by lower courts nationwide. Where significant First Amendment interests are threatened, this Court has liberalized its standards for reviewing such matters because of the "possible inhibitory effects of overly broad statutes." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). In fact, overbreadth challenges have been welcome by this Court where overbroad laws infringing on the right of association would instill a chilling fear into citizens to band together and speak. *See Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

Because citizens face jumbled constitutional standards to protect their associational interests when they raise challenges in courts nationwide, this Court should grant review to clear the constitutional slate for upcoming ballot referenda in 2010.

### 1. Decisions following NAACP v. Alabama have left the associational right in a hazy bog that restricts associational privacy for ballot measure advocacy without a compelling governmental interest.

This Court described three narrow exceptions to the constitutional right of association in the context of candidate elections in *Buckley*. 424 U.S. at 60-82. These limited governmental interests "outweigh the possibility of [First Amendment] infringement": providing information as to where political campaign money comes from and how it is spent by the candidate, avoiding corruption or the appearance of corruption of the candidate, and enforcing candidate contribution limitations. *Id.* at 66-68.

In *Bellotti*, this Court unequivocally stated that the second interest in disclosure described in *Buckley* does not apply to ballot measures: The "risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue." 435 U.S. at 790. Likewise, in *Citizens*, 454 U.S. 290, 299-300, this Court overturned contribution limits in ballot measure campaigns, negating the third governmental interest.

Despite this distancing between the government's interest in candidate campaign disclosure and ballot measure campaign disclosure, lower courts nationwide take *Buckley* to mean that ballot disclosure may be upheld based on interests held applicable to candidate elections. *See, e.g.*, *Coffman*, 209 P.3d at 1141-43; *Richey v. Tyson*, 120 F. Supp. 2d 1298, 1314-15 (S.D. Ala. 2000); *Volle v. Webster*, 69 F. Supp. 2d 171, 173-74 (D. Me. 1999).

If *Buckley* provides a compelling governmental interest supporting disclosure in general, it must be the first interest: "[D]isclosure provides the electorate with information 'as to where political campaign money comes from and how it is spent by the candidate' in order to aid the voters in evaluating those who seek federal office." 424 U.S. at 66-67. However worthy this informational interest may be, it is not implicated in ballot measure campaigns. Candidates may lie; black letter law does not. Candidates may change positions in response to economic support; the words of a ballot measure do not. This Court has previously stated that "[t]hough [a disclosure] requirement might provide assistance to critics in evaluating the quality and significance of [a] writing, it is not indispensable." *McIntyre*, 514 U.S. at 342 n.5.

A bevy of lower courts nationwide have recklessly expanded *Buckley*'s remaining interest to support everything from educating the electorate, *Richey*, 120 F. Supp. 2d at 1314, to treating citizens as legislators and ballot measure advocates as lobbyists.

*ProtectMarriage.com*, 599 F. Supp. 2d at 1209; *but see Swaffer*, 610 F. Supp. 2d at 968 ("The government's interest in keeping the public informed of where and how the teetotalers of Whitewater are spending their money to rally support against a liquor referendum is not commensurate with the government's interest in knowing which candidates for public office those same teetotalers financially support."). Given the expanding abuse of ballot measure disclosure to oppress individuals because of their political beliefs and associations in the Google Age, citizens seek this Court's shelter. And because lower courts have consistently upheld coerced ballot disclosure regimes with inconsistent standards, this challenge presents an excellent opportunity to secure and set clear constitutional standards for ballot measure advocacy.

### 2. Even assuming the government has a compelling interest in ballot measure disclosure, the threshold for exclusion provided by courts is too high to protect associational rights.

Under current trends, to escape disclosure, a minor party must show a reasonable probability of threats, harassment, or reprisals. *Buckley*, 424 U.S. at 74. But this was not always the case. In *Alabama*, this Court recognized that "state action which *may* have the effect of curtailing the freedom to associate is subject to the closest scrutiny" and it did not matter "whether the beliefs sought to be advanced by

association pertain to political, economic, religious or cultural matters." 357 U.S. at 460-61 (emphasis added). Still, the standard for protection morphed over time, requiring citizens to show actual harm suffered before courts would uphold associational rights of privacy. In *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 99 (1982), this Court affirmed a request for exclusion from disclosure after discussing past oppression in specific terms. It is nearly impossible for any association engaged in ballot measure advocacy to meet this standard. But even if they could, why should associations need to be injured before their constitutional rights will be protected?

Groups that engage in ballot measure advocacy are different in kind from political parties. When a ballot measure arises in a state, it often stands to amend a state's constitution, or at least potentially change a significant law within that state. Though groups may support or oppose a ballot measure for myriad reasons, in the end advocacy rests on urging a vote of "Yes" or "No." Unlike candidate elections, which are cyclical, the results of a ballot measure vote stand indefinitely. Thus, there is often far more at stake in a ballot issue than in a candidate election, and groups such as Independence Institute often get only one shot to make their case in a respective state.

So far, marriage ballot measures concerning the definition of marriage have spawned some of the most blatantly oppressive tactics. Still, other harassment exists. *See* David S. Broder, *Union Dues Initiative*

*Causing Divisions for Nevada GOP*, WASH. POST, May 5, 1998 at A04 (in a Nevada signature drive, unions against a ballot initiative sent a mailing to rural counties stating "Your names will be turned over to the government"); Steve Suo and Jeff Mapes, *Measure 8 Sponsors Won't List Donors*, OREGONIAN, Dec. 9, 1994 at D09 (advocacy group refused to disclose after public employees threatened to boycott companies that supported a ballot measure); Gigi Brienza, *I Got Inspired. I Gave. Then I Got Scared*, WASH. POST, Jul. 1, 2007 at B3 (animal rights activist group used employer information in disclosure filings to compile a list of addresses of Bristol-Meyers Squibb employees, under the heading "Now you know where to find them").

The use of death threats and other tactics was sudden and unexpected in the Proposition 8 campaign. Independence Institute and other groups that engage in ballot measure advocacy should not have to wait to be clubbed over the head to qualify for First Amendment protection. The retrospective nature of disclosure exclusion is troubling enough, but what is worse is that, if one follows *Brown*, it is not until after the votes are tallied that a group such as Independence Institute can even determine if it was of the "minor" opinion in a particular ballot measure, and thus protected. *See ProtectMarriage.com*, 599 F. Supp. 2d at 1216 ("the 'minor party' requirement . . . is very much relevant and in-tact" in a challenge by a ballot measure group). By then, it is far too late: disclosure is an ongoing process leading

up to a ballot measure, and once contributions are published on the Internet they may be freely copied and are likely made available in perpetuity. Finally, while a political party may seek and retain exclusion for some time, expecting Independence Institute to make a reasonable showing in court each time a ballot issue arises in Colorado asks too much of citizens simply desiring to band together and speak. Whether citizens seeking vindication of their associational privacy rights are beaten or bruised should play no role in determining their protection. This sort of regime chills association nationwide – asking citizens to subject themselves to harassment before taking their constitutional rights seriously.

### C. Conflicting Anonymity Standards in Courts Nationwide Chill Speech and Limit Association

While the associational right to privacy has been muddled in the fallout of *Buckley*, lower courts have likewise avoided serious consideration of the right to anonymity for ballot measure disclosure in light of this Court's reasoning in *McIntyre*, 514 U.S. 334, and *Buckley v. American Constitutional Law Foundation* (*ACLF*), 525 U.S. 182 (1999), which recognize the protection of anonymity in political speech. At present, the protection granted to anonymous pamphleteering is regarded as not "expansive" enough to translate to protection of the anonymity of contributions for the purpose of issue advocacy. *Coffman*, 209 P.3d at 1142; *Cal. Pro-Life Council, Inc. v.*

*Getman*, 328 F.3d 1088, 1104 (9th Cir. 2003). But the technological advancements that now permit the widespread, speedy dissemination of donor information call for application of the anonymity recognized in *McIntyre* and *ACLF* to contributions in ballot measure advocacy.

*McIntyre* affirms that an individual actor's anonymity is protected from disclosure when circulating political pamphlets because "identification of the author against her will is particularly intrusive: it reveals unmistakably the content of her thoughts on a controversial issue." 514 U.S. at 355. In *ACLF*, this Court recognized the right to anonymity in circulating a petition for a ballot initiative. 525 U.S. at 197-200. Both cases leave room for campaign disclosure in line with *Buckley*: "Disclosure of an expenditure and its use, without more, reveals far less information. . . . [E]ven though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill – and as a result . . . it is less likely to precipitate retaliation." *McIntyre*, 514 U.S. at 355. Following *ACLF*, affidavits disclosing the circulator's name and address are permitted, but requiring a circulator to wear a nametag is not, because "[t]he affidavit . . . does not expose the circulator to the risk of 'heat of the moment' harassment." *ACLF*, 525 U.S. at 199 (citing *American Constitutional Law Foundation v. Meyer*, 870 F. Supp. 995, 1004 (Colo. 1994)).

Ballot measures are specific acts of legislation. This Court should recognize that the associational rights of citizens donating to ballot organizations

enjoy no less constitutional protection than writing a pamphlet advocating a position. Disclosure of a ballot measure campaign contribution effectively eradicates a citizen's ability to associate quietly while serving no defined governmental interest. Furthermore, the ability to instantly access disclosure provisions almost anywhere at any time over the Internet makes ballot measure disclosure a tool for purposes of retaliation or harassment, both long-term and in "heat of the moment." These conditions paint a scenario implicating this Court's need to clarify the protection of individuals who wish to donate to ballot measures anonymously in the tradition of *McIntyre* and *ACLF*.

This Court should vindicate the right to anonymity recognized in *McIntyre*. *Alabama, ACLF,* and *Bellotti* are proper precedent to assist this Court in narrowing ballot measure disclosure to protect First Amendment anonymity. In *Alabama*, this Court noted that "[the NAACP] has not objected to divulging the identity of its members who are employed by or holding official positions with it. It has urged the rights solely of its ordinary rank-and-file members." 357 U.S. at 464. In *ACLF*, this Court affirmed the unconstitutionality of disclosing amounts paid to petition circulators while affirming the disclosure of ballot initiative sponsors, or those who pay the circulators and how much they pay. 525 U.S. at 204-05.

The Independence Institute likely agrees with the NAACP in this fashion: it lists its staff members, board of trustees, center directors, senior fellows and

research associates on its website, www.i2i.org. As an organization, Independence Institute is willing – more likely proud – to be identified with its positions. But this does not waive the right of its rank-and-file members to keep their support of the Independence Institute anonymous. "Identification of the source of [corporate] advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." *Bellotti*, 435 U.S. at 792 n.32. Surely this Court did not intend each individual employee or donor to a corporate non-profit to be included in such disclosure.

First Amendment associational rights and the right to speak anonymously do not provide an absolute right to anonymity or absolute protection from all unpleasant forms of engagement. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Using bumper stickers, yard signs, buttons, or voicing an opinion without taking steps to protect one's anonymity quickly surrenders that right. It is important to emphasize, however, that much of the recent oppressive acts in ballot measure campaigns and the growing chill on ballot measure advocacy is made possible only because of state coerced disclosure. If one's anonymity is compromised through carelessness or other means, the First Amendment does not provide a blanket to which he or she may retreat. However, until one waives their right, it is not the place of government to force those who wish to speak anonymously out into the open.

Currently, in regard to both associational rights and anonymous speech, it is regulation, rather than speech, that dominates. Associational privacy is protected only for minor groups who face overwhelming hostility, leaving recognized, popular advocacy groups unprotected until their support and clout is whittled into obscurity. Likewise, anonymity belongs to an individual, but should that individual seek to band together with like-minded persons in the political arena or support a group committed to one or many issues, the law immediately sacrifices anonymity. This Court should grant review to clarify judicial errors in this subject of controversy nationwide and to ensure that the right of association remains protected.

## CONCLUSION

For the foregoing reasons, the Cato Institute, Wyoming Liberty Group, and assembled *amici* respectfully request this Court to grant the petition for certiorari.

Respectfully submitted,

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